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CHILDREN COME FIRST

A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines

VOLUME 1

Department of Justice
Canada

Ministère de la Justice
Canada

Canada

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Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the *Federal Child Support Guidelines*

Volume 1

TABLE OF CONTENTS

Minister's Preface iii
Introduction v

VOLUME 1

I. *Federal Child Support Guidelines*: A Comprehensive Review 1
II. Supporting Family Justice Services 27

Appendices

Appendix 1: Chronology of Events Leading to the Tabling of the Report 39
Appendix 2: Changes in Taxation Rules for Child Support 41
Appendix 3: Survey of Child Support Awards Under the *Divorce Act* 45
Appendix 4: Supplementary Tables–Survey of Child Support Awards 47

Minister of Justice
and Attorney General of Canada

Ministre de la Justice
et Procureur général du Canada

The Honourable/L'honorable Martin Cauchon

Ottawa, Canada K1A 0H8

I am pleased to table *Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines,* in accordance with the provisions of section 28 of the *Divorce Act.*

When the Guidelines came into effect on May 1, 1997, they significantly changed the way Canadian parents determine child support amounts. Five years later, it is clear they are working well. Child support amounts are now predictable and consistent, ensuring that children receive the financial support they deserve from both their divorcing parents. The Guidelines have reduced conflict and tension between parents by making the calculation of child support orders more objective. This, in turn, has improved the efficiency of the legal process and most parents are now setting child support amounts without going to court.

The success of the Guidelines would not have been possible without the collaborative efforts of both levels of government as well as the contributions of the legal community and the Canadian public. I would like to commend the Federal-Provincial-Territorial Task Force on the Implementation of Child Support Reforms, the Federal-Provincial-Territorial Family Law Committee and the Advisory Committee on Child Support for their valued input.

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INTRODUCTION

The tabling of this report before Parliament fulfills a statutory commitment for the Minister of Justice to report to Parliament on the results of the Child Support Initiative, which was implemented five years ago. Volume 1 contains information on this implementation and on the related research findings of the federal Department of Justice. The appendices that make up Volume 2 contain additional background and research information that will be useful to readers.

The Government of Canada took a huge step in reforming the child support system when it implemented the Child Support Initiative. The Initiative has been a solid success. Fair, consistent and predictable amounts of support for children whose parents are separated or divorced have been established across the country, and every effort is being made to ensure children receive that support in full and on time.

The Guidelines have helped reduce conflict and tension between parents by making the calculation of child support more objective, and by improving the efficiency of the legal process to such an extent that most parents are now setting child support amounts without going to court.

In reviewing the operations and provisions of the Guidelines, the Department of Justice consulted with the legal profession and worked with the provincial and territorial governments. In addition, the Department invited public opinion in the form of consultation papers and focus groups. The work of two Parliamentary Committees also helped in this review: The Standing Senate Committee on Social Affairs, Science and Technology; and the Special Joint Committee on Child Custody and Access.

While the Guidelines have been a solid success, the Department's review has resulted in recommendations for improving some aspects; therefore, this report includes the Government of Canada's recommendations for amending the Guidelines.

I. FEDERAL CHILD SUPPORT GUIDELINES: A COMPREHENSIVE REVIEW

Section 28 of the *Divorce Act*
The Minister of Justice shall undertake a comprehensive review of the provisions and operation of the Federal Child Support Guidelines and the determination of child support under this Act and shall cause a report on the review to be laid before each House of Parliament within five years after the coming into force of this section.

When they were implemented in 1997, the Federal Child Support Guidelines significantly changed the way Canadian courts determined child support amounts. Five years later, it is clear that the Guidelines are working well. Child support amounts are predictable and consistent, and the vast majority of parents are setting child support amounts without going to court.

Still, there is room for improvement—in terms of what the law says and how it works. This volume reviews various aspects of the Guidelines and recommends reforms. For analysis of particular provisions of the Guidelines and the *Divorce Act*, readers should consult the section-by-section reviews in Volume 2.

This part of the report also describes how the federal Department of Justice has worked since 1997 with its provincial and territorial counterparts to implement the Guidelines across Canada. These varied activities include funding family law services in all provinces and territories; conducting public awareness and information campaigns for parents, judges, and lawyers; carrying out a comprehensive research program; and working with the provinces and territories to improve the enforcement of child support orders.

BACKGROUND

In the late 1980s, many separating and divorcing parents, family law professionals, and others were looking for better ways to determine the amount of financial support parents pay for their children.

Critics said that the system in place at that time for determining child support was producing amounts that were too low, inconsistent, and unpredictable. The lack of predictability was a particular concern, since it tended to encourage parents to go to court over child support, which increased the costs of separation and divorce, and increased conflict and the demands on the family law system.

In 1990, the federal, provincial, and territorial ministers of justice and attorneys general directed the Federal-Provincial-Territorial Family Law Committee to examine these concerns and recommend improvements to the family law system.

The Family Law Committee's work is documented in a series of reports and studies published between 1991 and 1995, including two public consultation documents: *Child Support: Public Discussion Paper* (June 1991) and *The Financial Implications of Child Support Guidelines* (May 1992).[1]

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[1] **Federal-Provincial-Territorial Family Law Committee, *Child Support: Public Discussion Paper*, Ottawa: Department of Justice Canada, June 1991; and, Federal-Provincial-Territorial Family Law Committee, *The Financial Implications of Child Support Guidelines*, Ottawa: Department of Justice Canada, May 1992.**

In its *Report and Recommendations on Child Support* (January 1995),[2] the Committee proposed that child support guidelines be established under the *Divorce Act* for parents, judges, and lawyers to use to determine child support. Such guidelines would set the amount of child support based on the number of children concerned and the income of the parent who would be paying the support.

At this time, Canadians were also criticizing the way the tax system dealt with support payments. Many said it was unfair that parents paying child support could deduct the payments from their taxable income, while parents receiving child support had to pay tax on what they received. The deduction-inclusion tax rules for child support provided a tax benefit when the support-paying parent was in a higher tax bracket than the custodial parent because the tax savings from the deduction exceeded the tax paid due to inclusion. It was seen as unfair that whether or not there was a tax benefit available to a family depended solely on the income discrepancy of the two parents, and not at all on the needs of the children.

In addition, many parents disliked the cumbersome process of managing payments and deductions throughout the tax year. Moreover, judges, lawyers, and parents found that the tax calculations involved were so complex that they made determining child support amounts very difficult.

A third area of concern was enforcement. Many parents had found there was no way for them to ensure that they received their support payments in full and on time. The Government of Canada had already helped the provinces and territories with enforcement by putting a law into place that allowed federal employees' wages to be garnisheed if the employees were not making their support payments. Another law allowed the provinces and territories to use federal databases to trace parents who were not paying their support, and to garnishee federal payments such as income tax refunds and employment insurance. Still, many people felt that governments could do more in the area of enforcement.

In March 1996, the Government of Canada announced its intention to address these concerns by improving the way child support amounts were determined, taxed, and enforced.

- It amended the *Divorce Act* to introduce child support guidelines to help parents, lawyers, and judges set fair, predictable, and consistent child support amounts in divorce cases.
- It changed the tax treatment of child support payments made under orders or agreements dated on or after May 1, 1997, so they would no longer be taxed as income for the parent who receives them nor be tax deductible for the parent who pays them.
- It introduced new federal measures and enhanced services to help provincial and territorial enforcement agencies ensure that support is paid in full and on time.

The federal Department of Justice, through the Child Support Initiative, introduced the Federal Child Support Guidelines and enhanced family support enforcement measures. The federal Department of Finance and the Canada Customs and Revenue Agency (formerly Revenue Canada) implemented the new tax treatment of support payments, along with an increase in the maximum level of the Working Income Supplement of the Child Tax Benefit, which was announced at the same time (see Appendix 2 for a complete discussion of the tax-related measures).

THE CHILD SUPPORT INITIATIVE

The Child Support Initiative was a five-year program to pursue seven key activities:[3]

- amend the *Divorce Act* and other legislation to introduce child support guidelines and provide additional enforcement tools to help the provinces and territories;

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[2] Federal-Provincial-Territorial Family Law Committee, *Report and Recommendations on Child Support*, Ottawa: Department of Justice Canada, January 1995.

[3] An internal Department of Justice Canada evaluation that looked at the success of the Initiative focussing on its programming elements, rather than on the impact of the legislative changes, has taken place.

- strengthen federal assistance for provincial and territorial enforcement procedures to ensure family support obligations are respected;
- improve the public's awareness, knowledge, and understanding of family support obligations through a general communications campaign;[4]
- implement a cooperative education program for provincial and territorial justice officials, justice service providers, and the public;
- provide financial help so that provinces and territories could provide innovative, efficient, and cost-effective services to help parents set up child support orders;
- provide financial help so that provinces and territories could enhance their Maintenance Enforcement Programs; and
- conduct research to monitor the effects of the child support guidelines and the new enforcement measures.

THE GUIDELINES AT A GLANCE

The Federal Child Support Guidelines are a set of rules and tables for determining the amount that a parent paying child support should contribute toward his or her children.[5] They are designed to advance the best interests of children and to ensure that children get an appropriate level of child support from both parents. They also make it faster, easier, and less expensive for parents to arrive at an amount.

The Guidelines (and the *Divorce Act*, of which the Guidelines are a part) apply to legally married parents who separate and then seek a divorce, as well as to parents who are already divorced.

Tables containing child support amounts for each province and territory are generated using the Federal Child Support Guidelines formula. Each table sets out the amounts based on two elements: the income of the parent who will pay child support (called the paying parent) and the number of children involved.

The tables are useful for parents whose situations are relatively straightforward. However, when there are special circumstances, the Guidelines provide flexibility. For example, parents can adjust the table amounts to account for special expenses such as day care, situations of undue hardship, shared or split custody arrangements, exceptionally high income, and children the age of majority or over.

The word *guidelines* may suggest that the rules and child support tables are only for reference. This is not the case. In fact, judges must use the Guidelines in almost every case. (The *Divorce Act* allows a few exceptions, such as situations in which both parents agree to an arrangement that the judge finds reasonable.) This can be helpful for couples who wish to make their child support arrangements without going to court. Parents can look at the child support tables to see what a judge would order, and this may help them agree on a child support amount.

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[4] **To support the implementation of the Initiative, a wide variety of public education and communications activities were undertaken to help parents, family law professionals and Canadians generally. These included a toll-free information line, direct-mail campaigns, publications and an advertising drive. For detailed information please consult Volume 2.**

[5] **Between 1991 and 1994, the Department of Justice Canada did extensive research on behalf of the F-P-T Family Law Committee to develop the formula that generates the amounts in the child support tables. This involved balancing the interests of all the parties involved and searching for a solution that was not only fair and equitable, but that also worked well in practice. Following a thorough evaluation of various methods of sharing child costs between parents, a process that involved statistical evidence on expenditures on children, data from court orders and extensive consultations, the committee opted for a method known as the Revised Fixed Percentage Formula. See: Finnie, Ross, *et al.*, *Highlights - An Overview of the Research Program to Develop a Canadian Child Support Formula*, Ottawa: Department of Justice Canada, Communications and Consultation Branch, 1995; Finnie, Ross, et al., *An Overview of the Research Program to Develop a Canadian Child Support Formula*, Ottawa: Department of Justice Canada, Communications and Consultation Branch, 1995; Child Support Team, *Formula for the Table of Amounts Contained in the Federal Child Support Guidelines: A Technical Report*, Ottawa: Department of Justice Canada, (CSR-1997-1E/1F), 1997.**

PROVINCIAL AND TERRITORIAL GUIDELINES

Since 1997, most provinces and territories have implemented child support guidelines in law. Alberta, the one exception, has implemented them in practice. A thorough review of the provincial and territorial child support guidelines can be found in Volume 2.

TAXATION OF CHILD SUPPORT

When the Government of Canada amended the *Divorce Act* to introduce the Federal Child Support Guidelines, it also amended the *Income Tax Act* to change the way child support payments are treated for tax purposes.[6]

The child support reform package was announced in the 1996 federal budget. This package included new rules for taxing child support and enriched the Child Tax Benefit. Before child support reform, if you paid child support you could deduct the payments from your income for tax purposes, but if you received child support you had to treat the payments as income for tax purposes.

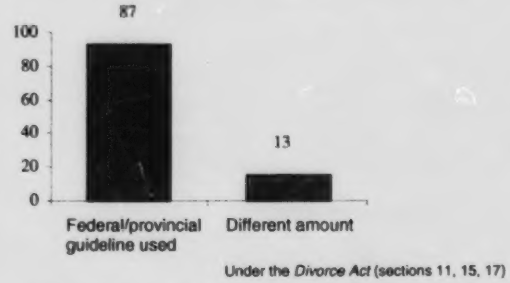
A SOLID STEP FORWARD

Since 1997, when the Guidelines came into effect, the federal Department of Justice has been keeping track of how Canadians have used the Guidelines to determine child support. Doing so has helped the Government gather valuable information it is now using to update and improve the Guidelines.

One way to measure the success of the Guidelines is to look at how often Canadians use them to determine child support (Figure 1). A particularly valuable source of information about the Guidelines is the Survey of Child Support Awards,[7] a database of information on 23,688 divorce cases involving children from across Canada (except Quebec and Nunavut) as of February 2001.

Figure 1: How the Award Was Determined

Percentage of cases for which the method used to determine award amount was reported[1]



[1] Includes 14,524 cases where the method of determining award amount was known.

Source: Survey of Child Support Awards database, February 2001.

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[6] **Additional information on the tax issue can be found in Appendix 2 attached at the end of this document.**

[7] **See Appendix 3 for a description of the Survey of Child Support Awards.**

In 14,524 of these cases, there is a record of the method used to determine child support.[8] The vast majority of these cases (87 percent) used the Guidelines. In the remaining cases a "different amount" was awarded as allowed under sections 11, 15, and 17 of the *Divorce Act*.

One can also use the Guidelines' objectives to see how well the Guidelines are helping Canadian children and parents (and others, such as lawyers, judges, and mediators) deal with child support issues. These objectives are intended to be a guide for parents, judges, and lawyers as they interpret the Federal Child Support Guidelines (see section 1).[9] The objectives are as follows:

(a) to establish a fair standard of support for children that ensures they continue to benefit from the financial means of both spouses after separation;
(b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
(c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and by encouraging settlement; and
(d) to ensure consistent treatment of spouses and children who are in similar circumstances.

With the help of the provinces and territories, the federal Department of Justice commissioned research that used these objectives to monitor how the Guidelines were working. This research looked at a number of issues related to each of the four objectives. Researchers collected child support information from divorce cases and studied surveys of such interested parties as parents, lawyers, and family justice services providers (such as mediators).[10]

OBJECTIVE 1:

TO ESTABLISH A FAIR STANDARD OF SUPPORT FOR CHILDREN THAT ENSURES THEY CONTINUE TO BENEFIT FROM THE FINANCIAL MEANS OF BOTH SPOUSES AFTER SEPARATION

Research in this area answered four questions.

- Do parents and professionals see the Guidelines as fair?
- Is there any indication that the intent of the Guidelines to ensure fair support from both parents has been circumvented in any systematic way?
- How do the child support amounts awarded under the Guidelines compare to pre-Guidelines amounts?
- Have the child support tables, which were published in 1997, become outdated as a result of subsequent changes to federal, provincial and territorial tax structures and parameters?

Do parents and professionals see the Guidelines as fair?

In a November 1998 survey of clients registered with the Family Maintenance Enforcement Program in British Columbia,[11] parents who had child support orders made under the Guidelines were asked whether they thought the amount was fair.[12]

[8] The 2,260 cases categorized as being "silent on child support/previous order dealt with support" were excluded from this analysis. Survey of Child Support Awards, February, 2001.

[9] The section-by-section review of the Guidelines suggests that the objectives are working well for these purposes, see Volume 2.

[10] For complete information on the research program, see: Child Support Team, *Child Support Initiative: Research Framework*, Ottawa: Department of Justice Canada, (CSR-1999-1B), 1999.

[11] In British Columbia, Family Maintenance Enforcement Program services are available at no cost to parties who choose to file their orders with the program. For most recipients, it operates as an opt-in system. The exception to this is recipients who are receiving income assistance. For this group, enrolment may not be voluntary. See Canadian Facts, *Child Support Guidelines Evaluation Highlights Summary*, (unpublished report), Burnaby, B.C., Family Maintenance Enforcement Program, British Columbia Ministry of the Attorney General, 1998.

[12] Canadian Facts, 1998 (footnote 11) at pp. 7-8.

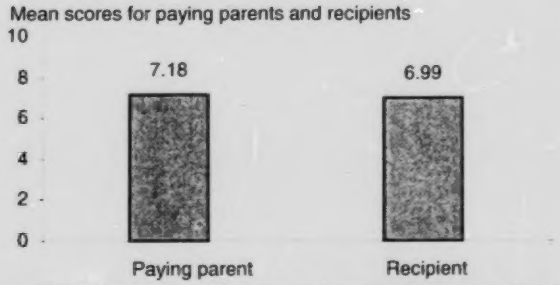
Among the 280 parents receiving child support who responded, 56 percent agreed that the amounts were fair, compared to 41 percent of the 279 paying parents in the sample. When those who felt the child support amounts were unfair were asked why, the most common responses among receiving parents were that the "amount does not cover costs" (69 percent) and that the paying parent "could afford more" (23 percent). Paying parents who found the amounts unfair often said that they could not afford them (34 percent), that they have obligations to another family (11 percent), and that the amount is simply too high (11 percent).[13]

In 1999, Alberta parents who had attended Parenting After Separation seminars were asked to assess the fairness of the Guidelines, based on their experience in arriving at an arrangement for payment of child support. Seventy percent of the 547 respondents who had used the Guidelines agreed or strongly agreed that the Guidelines "set a fair standard of support for children that makes sure they benefit from the financial means of both parents."[14] Although women were more likely to give a high rating for fairness (74 percent) than were men (65 percent), there was a high level of satisfaction overall.

In a later general population telephone survey, parents who had experience in using the Guidelines were asked to rate them in terms of fairness. For this survey, respondents were specifically asked to rate the Guidelines on a scale of 0 to 10 in terms of fairness to the paying parent, fairness to the recipient, and fairness to the children.[15]

Paying parents gave the Guidelines a rating of 5 out of 10 in terms of fairness to themselves. In contrast, receiving parents gave a score of 8 out of 10 in terms of fairness to paying parents. On the other hand, when parents were asked to rate the Guidelines in terms of their fairness to children, both paying and receiving parents rated the Guidelines at about 7 out of 10 (Figure 2).

Figure 2: Parents' Views on the *Federal Child Support Guidelines'* fairness to children[1, 2]



[1] Using a scale of 0 to 10, Guidelines users were asked to rate the Guidelines to the extent to which they perceived them to be "fair to children."

[2] The difference between paying parents and recipients is not significant.

N = 219

Source: Survey of Parents' Views of the Child Support Guidelines, 2000.

[13] **Canadian Facts, 1998 (footnote 11) at p. 8.**

[14] **Sieppert, J., *et al.*, *An Evaluation of Alberta's Parenting After Separation Seminars* (unpublished paper submitted to Alberta Childrens' Services), Calgary: Canadian Research Institute for Law and the Family, 1999, Appendix E, and secondary analysis of these data by Lorne Bertrand, 2001.**

[15] **Canadian Facts, *Survey of Parents' Views of the Federal Child Support Guidelines* (unpublished background research), Ottawa: Department of Justice, 2000.**

Lawyers and mediators who have completed questionnaires at conferences [16] and continuing legal education sessions[17] rate the Guidelines highly in terms of fairness to children and parents, and in terms of the predictability they have brought to child support amounts.

Is there any indication that the intent of the Guidelines to ensure fair support from both parents has been circumvented in any systematic way?

Early in the implementation of the Guidelines, there was some concern that the table amounts might not set a "floor" (or minimum acceptable amount) for child support payments, as was intended by the Family Law Committee, but rather a "ceiling."

Another concern was that the child support arrangements of parents who had a consent order or a written agreement might be exempt from the usual judicial scrutiny required by the *Divorce Act*. Although the *Divorce Act* makes it clear that judges must use the Guidelines when making original orders for child support, interim orders, and variations, judges may award a different amount[18] in certain circumstances.

Sole custody cases from the Survey of Child Support Awards were divided into two types (consent/uncontested cases and contested cases) to determine the extent to which the awards conformed to the applicable table amounts in each case.[19] Figure 3 shows that, for both types of cases, the proportions of cases in which the child support amounts were "less than," "equal to," or "greater than" the table amounts were virtually identical.[20] The amounts were less than the table amounts in between 5 and 6 percent of the cases. Two thirds of both types of cases had amounts that were equal to the table amounts and 30 percent had awards that were greater than the table amounts.

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[16] Some respondents commented that the Guidelines were fair in simple cases, but not so fair when discretionary matters were involved, see: *Paetsch, J., et al., Consultation on Experiences and Issues Related to the Implementation of the Child Support Guidelines* (unpublished paper), Calgary: Canadian Research Institute for Law and the Family, September 1998.

[17] Child Support Team, *The Child Support Guidelines Through the Eyes of Mediators and Lawyers*, Ottawa: Department of Justice, (BP23E), 2000, at p. 7.

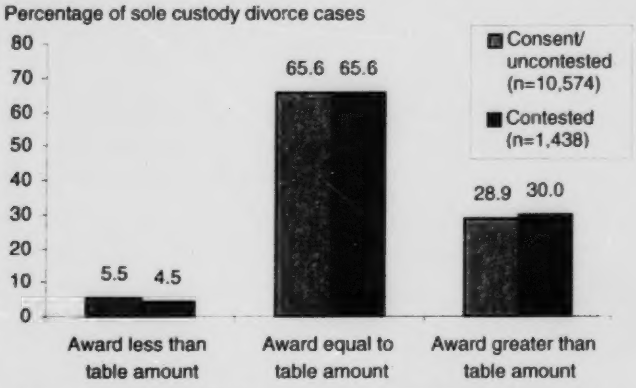
[18] See sections 15.1(5), 15.1(7), 17(6.4) and 17(6.5) of the *Divorce Act*.

[19] Because the distinction between "consent" and "uncontested" cases varied in the courts that were included in the study, it was necessary to combine these two categories when analyzing the data from the Survey of Child Support Awards. When this was done the vast majority of cases (88 percent) fell into the "uncontested/consent" category, and 11 percent were contested (Survey of Child Support Awards database, February 2001). For the purposes of the Survey of Awards, consenting cases included those in which it was clear that both parties consented to the order. Uncontested cases included cases for which it was clear that a judge had to make the finding in the absence of the respondent or the preamble stated that the finding was made by default. Variations were significantly more frequently contested (29.8 percent) than were original divorce orders or judgments (6.8 percent).

[20] To allow for minor variations from the table amounts as coded on the Survey of Awards data collection instrument, the child support award amount was considered to be equal to the table amount if it was within five percent (either higher or lower) of the table amount.

Based on this analysis and a review of related case law, it is clear that parents, judges, and lawyers view the table amounts as the minimal acceptable amount in the vast majority of consent and contested cases alike. (For more information, see the review in Volume 2 of sections 11, 15.1, 15.3, and 17 of the *Divorce Act.*)

Figure 3: Relationship of the Award to the Table Amount, by Disposition of the Order



Source: Survey of Child Support Awards database, February 2001.

Anecdotal evidence gathered soon after the Guidelines went into effect suggested that some paying parents were agreeing to generous tax-deductible spousal support orders to avoid paying taxable child support awards or to significantly reduce the amount of child support.[21] A spousal support amount was included in 11 percent of the cases in the database.

Figure 4 compares sole custody cases with and without spousal support amounts. It shows that there is little or no difference between the two groups in the proportion of cases with child support award amounts that are less than, equal to, or greater than the applicable table amounts.

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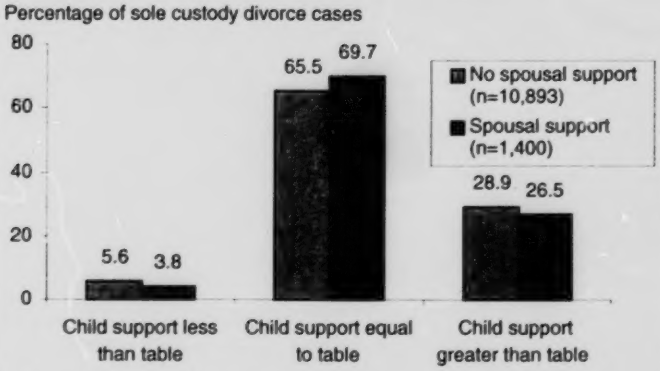
[21] **The *Divorce Act* ss. 15.3(1) stipulates that spousal awards are to be considered after child support has been determined. Similarly, although spousal support continues to be tax deductible for the payor, and to be taxable income in the hands of the recipient, tax deductions for spousal support are only allowable when evidence has been presented that the child support amount has been paid in full.**

Figure 4: Relationship of Child Support Award to the Table Amount, by the Presence or Absence of a Spousal Award Amount



Source: Survey of Child Support Awards database, February 2001.

In approximately 70 percent of the cases that included spousal support, the child support portion of the order was equal to the table amounts, compared to 66 percent of the cases without a spousal support component. More importantly, cases that included a spousal support amount were slightly *less* likely to have child support amounts that were below the applicable table amount (4 percent of cases) than if spousal support was not included (6 percent of cases).[22]

How do the child support amounts awarded under the Guidelines compare to pre-Guidelines amounts?

Many concerned observers have asked how the child support amounts ordered under the Guidelines compare with those made in the pre-Guidelines era. The federal Department of Justice compared post-Guidelines amounts (as recorded in the Survey of Child Support Awards database) with information in the 1992 Current Awards database, which was collected while the Guidelines were being developed.

Extensive testing and comparison of the two databases has shown that, generally speaking, post-Guidelines amounts were much more consistent at each payer income level than were pre-Guidelines amounts. The post-Guidelines amounts were generally higher than the pre-Guidelines amounts. These effects had been intended. [23]

Because there had been a particular concern about the impact of the Guidelines on low-income families, the federal Department of Justice analyzed cases in which both parents had incomes of $20,000 or less. This analysis showed that for one- and two-child families,[24] median and mean[25] amounts were considerably higher in post-Guidelines cases than in pre-Guidelines cases. In addition, post-Guidelines amounts were generally higher than the table amounts, even in cases without special expenses. This evidence shows that low-income parents are receiving higher award amounts than they were before the Guidelines were developed.

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[22] **Although the number of cases with child support amounts falling below the table amounts is very small (661 cases out of 12,293), a detailed analysis of these cases show some interesting differences between the cases with and without spousal support. The median income for the paying parents in cases with spousal support is relatively high ($74,227) compared to only $36,976 for those who are not paying spousal support. Survey of Child Support Awards database, February, 2001.**

[23] **After controlling for tax treatment, inflation, payor income and number of children.**

[24] **The small number of cases made it impossible to perform the tests on larger sized families.**

[25] **The median amount is the one above and below which 50 percent of the amounts fall. The mean amount is the average of all the amounts.**

Have the child support tables, which were published in 1997, become outdated as a result of subsequent changes to federal, provincial and territorial tax structures?

Ongoing research has ensured that changing federal, provincial and territorial tax regimes have not had a large impact on the table amounts generated by the formula.

Thus far the formula has been found to be robust. The significant changes to federal, provincial and territorial income tax regimes since 1997 have had minimal impact on the table amounts. When the child support tables are regenerated using the most recent tax information available, there is as yet no appreciable difference from the published 1997 table amounts.

RECOMMENDATION 1

The federal Department of Justice recommends that the child support tables be updated every five years, or sooner when changes in federal, provincial, or territorial tax regimes would have a significant impact on table amounts.

SUMMARY

Most professionals who have been asked to comment on the Guidelines say that the Guidelines establish a fair amount of support for children. There is strong evidence that the table amounts have been viewed as a "floor" in virtually all cases, whether the child support arrangements were contested or arrived at by consent.

OBJECTIVE 2:

TO REDUCE CONFLICT AND TENSION BETWEEN SPOUSES BY MAKING THE CALCULATION OF CHILD SUPPORT ORDERS MORE OBJECTIVE

Research in this area answered five questions.

- Do parents and professionals see the Guidelines as reducing conflict and tension between parents?
- Has the overall proportion of cases that result in litigation been reduced?
- Has there been any change in the proportion of cases that result in litigation when child support is the only issue being dealt with by the court?
- Has there been any change in the proportion of cases that result in litigation when custody is the only issue being dealt with by the court?
- What impact, if any, has the new "40 percent" timethreshold for shared custody had on levels of litigation?

Do parents and professionals see the Guidelines as reducing conflict and tension between parents?

Family Maintenance Enforcement Program clients in British Columbia were asked to rate the amount of conflict they experienced while they or the judge determined the child support amount. The clients used a seven-point scale, with 1 meaning "no conflict at all" and 7 meaning "a great deal of conflict."

For child support recipients, the Guidelines have not affected the amount of conflict; their average rating for level of conflict before and after the Guidelines were introduced is about 5 out of 7. There is a slight difference in paying parents' assessment of the conflict. The average score for paying parents after the Guidelines was 4.5 out of 7, compared with 4.1 out of 7 for paying parents before the Guidelines.[26]

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[26] **Canadian Facts, 1998 (footnote 11) at pp. 10-11.**

In contrast, 62 percent of 545 parents at a Parenting After Separation seminar in Alberta either agreed or strongly agreed that "the Guidelines reduce conflict and tension between partners."[27] Women were more likely to agree with this statement (64 percent) than were men (59 percent).

An even higher proportion (70 percent) of legal professionals said in 1998 that the Guidelines have reduced conflict and tension between parents, although some said the Guidelines increase conflict when the case is complex or has discretionary items.[28]

In the federal Department of Justice's 1998 surveys of lawyers attending continuing legal education courses, 64 percent agreed or strongly agreed that the Guidelines have successfully reduced conflict and tension between parents by making the calculation of child support orders or agreements more objective.[29] In 1999, mediators were also asked whether the Guidelines had reduced the amount of conflict between separating and divorcing parents. Fifty-four percent said there has been less conflict since the Guidelines were implemented, and 39 percent said that more cases are being settled solely by mediation since the Guidelines were implemented.[30]

Has the overall proportion of cases that result in litigation been reduced?

The Guidelines were developed in hopes of reducing the number of cases that result in litigation. This was also a goal of the numerous family justice services that the federal, provincial, and territorial governments offered to parents as the Guidelines were being implemented. Examples of such services include those offering child support workbooks for parents, parenting after separation courses, and increased access to mediation services.[31]

Undoubtedly, the high cost of going to court was an important deterrent to litigation in child support cases. At the same time, parents involved in litigation frequently seem more likely to harden their positions about outstanding issues, to increase conflict and tension, and to parent less cooperatively.

There is a common perception among legal professionals and mediators that the number of child support cases settled without litigation has increased since the Guidelines were implemented, although there is no information about how many pre-Guidelines cases went to trial. Lawyers surveyed at three continuing legal education seminars in 1998 estimated that, on average, 59 percent of their separation and divorce cases were settled by consent before the Guidelines were implemented, compared to 72 percent afterwards.[32]

The Survey of Child Support Awards database confirms that the vast majority of cases involving child support under the *Divorce Act* are settled by consent: from 86 percent of all cases in 1997–98[33] to 88 percent in 1999 and 93 percent in 2000 (see Appendix 4). There are some important differences among the cases, however, depending on specific characteristics. For example, about 31 percent of all variation orders were contested, as compared to only 8 percent of original divorce orders or judgments.[34]

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[27] See: Seippert *et al.*, 1999 (footnote 14) Appendix D.

[28] Paetsch Joanne J. *et al.*, *Federation of Law Societies of Canada Consultation on Child Support Guidelines and Custody and Access* (Ottawa: Department of Justice, Family, Children and Youth Section [2001-FCY-10E], 2001b)., at p. 6.

[29] Child Support Team, 2000 (footnote 17) at p. 7.

[30] See Child Support Team, 2000 (footnote 17) at pp. 11 and 15.

[31] See Volume 2 for a description of the Guidelines Implementation Program.

[32] See Child Support Team, 2000 (footnote 17) at pp. 6-7.

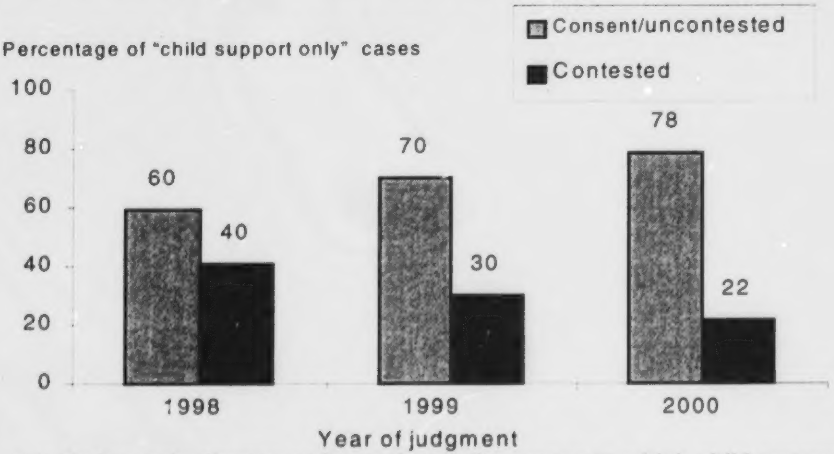
[33] For this analysis, data from the Pilot phase of the Survey and from Phase 2 were combined to provide a 1997-98 average. The Pilot survey data were collected between December 1997 and October 1998. Data collection for the Survey of Awards (Phase 2) started in November, 1998. See Appendix 3.

[34] Tables B and C in Appendix 4 provide frequency distributions of the "issues dealt with" in the Survey of Awards cases as a whole, and by whether the case was a divorce order, or a variation. In most cases, more than one issue is dealt with, the most common combination being "child support, custody and access," which occurs in about 30 percent of all cases. In 18 percent of the cases the combined issues were child support, custody, access and spousal support. In 13 percent of cases the only issue was child support. Variation orders accounted for nearly two-thirds of the cases in which child support was the only issue. A very high proportion (63

Has there been any change in the proportion of cases that result in litigation when child support is the only issue involved?

Cases in which child support is the only issue[35] are much more likely to be contested than other cases. Nevertheless, as can be seen in Figure 5, even among these cases there has been a steady reduction in the proportion of those that are contested, from 40 percent in 1998[36] to 22 percent in 2000.

Figure 5: Proportion of Contested Cases Decreases Over Time[1]



[1] Includes only divorce order and variation cases in which child support was the only issue. Number of cases: 1998 n=403; 1999 n=1,229; 2000 n=659.

Source: Survey of Child Support Awards database, February 2001.

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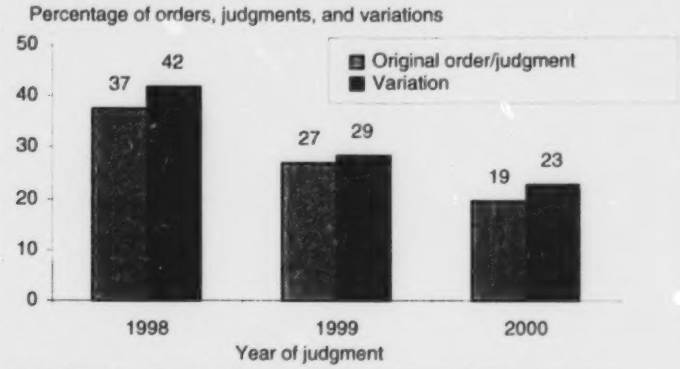
percent) of the divorce cases where child support was the only issue were interim orders for child support. Survey of Child Support Awards database, February 2001.

[35] We are not able to identify the specific issues that were contested in the more complex cases.

[36] In this chart the 1998 data are for November and December only. See Appendix 3.

Figure 6 illustrates that, although variations are still more likely to be contested than original divorce orders, the proportion of cases being contested has declined by almost 20 percent for both types of cases since 1998.

Figure 6: Proportion of Original Orders, Judgments, and of Variations that were contested, by year of judgment.[1]



[1] Includes only divorce and variation cases in which child support was the only issue.
Source: Survey of Child Support Awards database, February 2001.

The total number of cases for Figure 5 and Figure 6 differ because a number of contested cases could not be distinguished as original orders or variations.

Has there been any change in the proportion of cases that result in litigation when custody is the only issue being dealt with by the courts?

Mediators were asked whether the Guidelines had affected mediation of custody and access issues. While 36 percent of respondents said that it is harder to mediate custody and access since the Guidelines were passed, the majority of respondents (53 percent) said they found no difference or that it is easier now.[37]

The Survey of Child Support Awards database contains a relatively small number of cases in which custody alone, access alone, or custody and access were the only issues to be settled at the time of the divorce or variation order (see Tables B and C in Appendix 4). The proportion of cases in this subgroup that were settled by consent or were uncontested increased from 94 percent in 1998 to 99 percent in 2000.

What impact, if any, has the new "40 percent" time threshold for shared custody had on levels of litigation?

The time threshold for determining the difference between sole custody and shared custody arrangements is 40 percent. For shared custody, the children must spend at least 40 percent of the time with each parent.[38]

The Guidelines state that when a parent exercises access to, or has physical custody of, a child for 40 percent or more of the year, the court may order a support amount different from the amount prescribed by the Guidelines. In doing so, the judge considers the table value for each parent, the extra costs of shared custody, and the condition, means, needs, and other circumstances of each parent and any child for whom support is sought.

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[37] **See Child Support Team, 2000 (footnote 17) at p. 14.**

[38] **The review of section 9 of the Guidelines in Volume 2 outlines the various approaches that have been taken in the courts with regard to the determination of the two issues of time thresholds and determination of the amount of support.**

Although the proportion of shared custody arrangements is very small, the Survey of Child Support Awards data show that there has been a slight increase in such arrangements (from 4.7 percent of cases in 1998 to 5.4 percent in 1999 and 6.6 percent in 2000).[39]

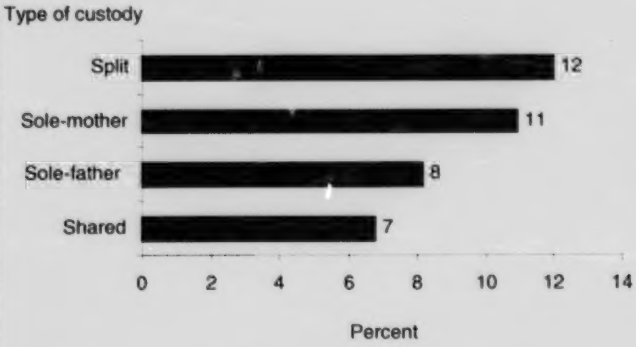
One legal commentator reports the following:

> Claims for shared parenting are increasing. Whether it's the hope of paying reduced child support pursuant to [section 9 of the Guidelines], or that they want to stay more actively involved in their children's lives after family breakdown, an increasing number of fathers are seeking shared parenting.[40]

When all cases in the Survey of Child Support Awards are grouped by type of custody arrangement, there is very little difference in the proportion of cases in each custody category that were contested. According to these data, shared custody cases were the least likely to be contested—seven percent of 1,185 cases (Figure 7).[41]

By comparison, 12 percent of the 1,006 split custody cases[42] were contested, 11 percent of the 15,621 sole-mother custody cases were contested, and 8 percent of the 1,787 sole-father custody cases were contested.[43]

Figure 7: Proportion of Contested Cases by Type of Custody
(split, sole-mother, sole-father and shared custody cases)



Source: Survey of Child Support Awards database, February 2001.

SUMMARY

It was not possible to directly, objectively measure levels of conflict between parents before and after the Guidelines. Nonetheless, professionals with experience working on child support cases feel that conflict has decreased under the Guidelines. In addition, the proportion of child support cases under the *Divorce Act* that have had to be settled in court decreased sharply from 1998 to February 2000.

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[39] See Appendix 4 – "Supplementary Tables," Table D.

[40] McLeod, Jay, *This Week in Family Law* (Newsletter), June 26, 2001. McLeod's Newsletter is posted for subscribers on the Carswell website.

[41] It must be noted that the Survey of Child Support Awards cannot provide information on the number of cases in which there may have been a *failed* application for sole, shared or split custody.

[42] A split custody arrangement exists when each parent has custody of one or more children of the marriage. In these cases the amount of the child support order is the difference between the amount that each spouse would otherwise pay if a child support order were brought against each of the spouses. See Federal Child Support Guidelines, s. 8.

[43] See the review of sections 8 and 9 of the Federal Child Support Guidelines in Volume 2, for more information on shared and split custody.

OBJECTIVE 3:
TO IMPROVE THE EFFICIENCY OF THE LEGAL PROCESS BY GIVING COURTS AND PARENTS GUIDANCE IN SETTING THE LEVELS OF CHILD SUPPORT ORDERS AND BY ENCOURAGING SETTLEMENT

Statistical information on family court case flow is not available, so it is not possible to demonstrate definitively that the Guidelines have made processing of child support cases more timely or less costly to parents and the courts. Even if such court processing data were available, several factors would make it difficult to come up with unassailable empirical evidence that the Guidelines themselves have improved the efficiency of the legal process.

For example, when the Guidelines were brought in, many courts set up or expanded services intended to improve the efficiency of the legal process. These services would provide information about the Guidelines,[44] help people file required documents related to child support, and help people calculate child support amounts based on income and other information.

We have evaluated court-based services for separating and divorcing parents in Newfoundland and Labrador, Prince Edward Island, Nova Scotia, Manitoba, Alberta, and British Columbia.[45] Although virtually all the evaluations concluded that clients and professionals working in the vicinity received the additional services positively, none of the evaluations were able to distinguish between the impact, if any, of increased court service levels and the impact of the Guidelines themselves.[46]

Do parents and professionals feel that the Guidelines have improved the efficiency of the legal process?

In a follow-up survey of participants in Alberta's Parenting After Separation seminars, 80 percent of the 547 respondents agreed or strongly agreed that "the Guidelines make the legal process more efficient by giving courts and spouses guidance in setting levels of child support." Male (78 percent) and female (82 percent) respondents made this very positive assessment almost equally.[47]

There is a strong perception among legal professionals that the Guidelines have improved the efficiency of the legal process. Three-quarters of all respondents surveyed at a conference and at continuing legal education courses in 1998 agreed or strongly agreed that the Guidelines were improving efficiency. Similarly, 73 percent of mediators said that the process of mediating a child support agreement has improved under the Guidelines.[48]

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[44] See, e.g.: Department of Justice, *Federal Child Support Guidelines: A Workbook for Parents*, Ottawa: Department of Justice Canada, 1997.

[45] See: Institute for Human Resource Development, *Final Evaluation Report – Support Application Worker Program Newfoundland and Labrador*, (unpublished paper), Ottawa: Department of Justice, Child Support Team (BP18E), 2000; McKenzie, Brad, *Evaluation of Comprehensive Co-Mediation and Mediation Internship Pilot Project*, unpublished Interim Report, 2000; McKenzie, B., and I. Guberman, *Evaluation of For the Sake of the Children: A Parent Education Program for Separating and Divorcing Parents (Phase 2 Final Report)*, Winnipeg: University of Manitoba, Faculty of Social Work, Child and Family Services Research Group, 2000; Richardson, C. James, *Evaluation of the Nova Scotia Child Support Guidelines Intake Assistant Program*,(unpublished paper), Ottawa: Department of Justice, Child Support Team (BP22E), 2000; Roberts, Tim, *An Evaluation of Child Support Clerk Functions, Final Report*, Victoria, B.C.: Ministry of Attorney General, Management Information and Evaluation Division, 2000; and, Sieppert, J., et al., 1999 (footnote 14).

[46] On the other hand, a case could be made that the codification of the calculations found in the Guidelines, and the subsequent availability of computer software to assist in making or verifying calculations done by parents or legal counsel was a pre-requisite for the development of these specialized child support services.

[47] See: Sieppert, 1999 (footnote 14).

[48] See: Paetsch *et al.*, 2001a (footnote 28) and, Child Support Team, 2000 (footnote 17).

When asked specifically about the speed with which cases are being resolved under the Guidelines, 72 to 79 percent of lawyers agreed or strongly agreed that cases are being resolved more quickly. In the survey of mediators, 66 percent of respondents said that agreements are reached more quickly under the Guidelines, 16 percent said there has been no change, and six percent said that the process takes longer.[49]

SUMMARY

Despite the lack of case processing statistics, the perceptions of parents, lawyers, and mediators alike is that the Guidelines have definitely made the legal process in child support cases more efficient.

OBJECTIVE 4: TO ENSURE CONSISTENT TREATMENT OF PARENTS AND CHILDREN WHO ARE IN SIMILAR CIRCUMSTANCES

To assess consistency of treatment issues, *similar circumstances* have been defined in terms of the type of custody arrangement, the number of children, and the paying parent's income. Two major components of the Guidelines were examined for consistency of application:

- the child support table amounts; and
- the discretionary components (the use of the special expenses provisions, the outcome of undue hardship applications, and the calculation of time and support amounts in shared custody cases).

Are the Guidelines table amounts being used as intended in determining child support?

There is compelling evidence from the Survey of Child Support Awards database and from case law reviews that the table amounts are being used consistently as the "floor" or basic amount being awarded in sole custody cases.[50] Lawyers and mediators also share the perception that the Guidelines objective of "ensuring consistent treatment of spouses and children in similar circumstances" has been met.[51]

Are the discretionary components of the Guidelines being interpreted consistently across the country?

It is more difficult to determine whether consensus is developing about how to interpret the discretionary components of the Guidelines. A significant minority of professionals who responded to questionnaires on this are concerned that there is still too much judicial discretion, both in applying the special expenses[52] and undue hardship provisions, and in determining child support in shared custody situations.[53]

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[49] See: Paetsch *et al.*, 2001a (footnote 28) and, Child Support Team, 2000 (footnote 17).

[50] Bertrand, Lorne D., et al., *The Survey of Child Support Awards: Interim Analysis of Phase 2 Data (October 1998 – March 2000)*, Ottawa: Department of Justice, Family, Children and Youth Section (CSR 2001-2E/2F), 2001 at p. 54; and, see Figures 2 and 3 above.

[51] See: Sieppert, 1999 (footnote 14) at p. 7; and, Child Support Team, 2000 (footnote 17) at p. 7.

[52] One third (32.3 percent) of the cases in the Survey of Child Support Awards database involved special expenses. Although the reasons for the special expenses varied widely, child care expenses were the most frequently cited (12.4 percent), followed by medical and dental insurance premiums (10.8 percent), and extracurricular activities expenses (10.5 percent). In 867 cases, the only reported child was over the age of majority. Special expenses were awarded in 29 percent of these cases. The type of expense was reported in 387 of these cases. Post-secondary expenses accounted for the greatest proportion (42.2 percent) of these expenses, followed by health-related expenses (20.4 percent), medical-dental expenses (18.6 percent) and extracurricular expenses (10.3 percent). Survey of Child Support Awards database, February, 2001

[53] See: Child Support Team, 2000 (footnote 17) at p. 7; and, Child Support Team, *Federal Child Support Guidelines - A Review of Technical Issues and Proposed Solutions - Consultation Paper and Feedback Booklet*. Ottawa: Department of Justice, 1999.

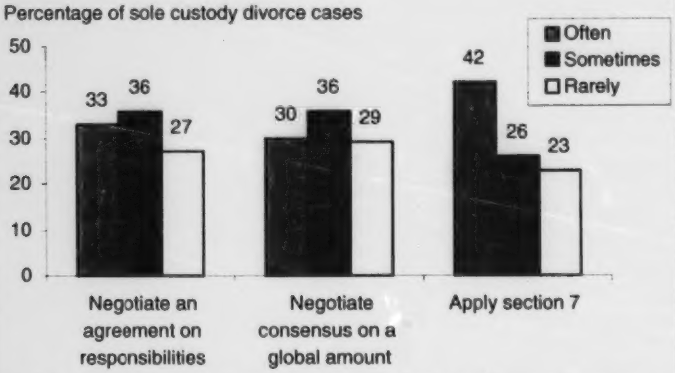
How are family mediators and courts dealing with special expenses?

Family mediators were asked how they dealt with special expenses when arriving at a child support agreement. Respondents were asked whether they always, often, sometimes, rarely, or never used three alternative methods:

- negotiate an agreement on responsibilities for current or impending special expenses and do not include a specific dollar amount or proportion in the agreement;
- negotiate consensus on a global amount that is included in the agreement; and
- apply section 7, including calculations for any or all of the prescribed items (using the guiding principles or proportional income and tax relief when applicable), and include a specified dollar amount or proportion in the agreement.

Two-thirds of respondents used all three methods often. They reported using section 7 (the third option) slightly more frequently (42 percent of respondents used it often) than the other approaches (33 percent and 30 percent, respectively). See Figure 8.

Figure 8: Methods Mediators Use to Deal with Special Expenses in Arriving at an Agreement



Source: *The Child Support Guidelines Through The Eyes of Mediators and Lawyers.* Ottawa: Department of Justice, 2000, Table 7, p. 13.

When the Survey of Child Support Awards data on sole custody cases are pooled for all provinces, a clear pattern emerges: the higher the income of the paying parent, the more likely the case is to have special expenses. The proportions increase from 13 percent when the paying parent's income is between \$1 and \$14,999 to 57 percent of cases when income ranges between \$75,000 and \$149,999.[54]

Further analyses compared similarities and differences among the provinces on the extent to which special expenses are used. To do this, all cases in which the paying parent's income was not above \$150,000 were grouped into three income groups with an equal number of cases in each.[55] The resulting income ranges were as follows:

- group 1 (less than \$27,182),
- group 2 (\$27,182 to \$44,999), and
- group 3 (\$45,000 to \$150,000).

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[54] **See Bertrand *et al.*, 2001 Interim Analysis (footnote 50). In addition, the amount of special expenses ordered increased as paying parents' incomes increased.**

[55] **Thirty-eight percent of all cases in the database (n= 6,684) met the criteria for this analysis (i.e. income of the payor was known, and was \$150,000 or less, and special expenses were included in the order). Survey of Child Support Awards database, February 2001.**

Restricting the analysis to the provinces with 100 or more of these cases (Table 1), the overall proportion of cases with special expenses ranges from a low of 22 percent in Nova Scotia to a high of 43 percent in Alberta. In the highest income group, Ontario cases are much more likely to include special expenses (63 percent) than Alberta cases (50 percent), and both provinces have much higher proportions of special expense cases in this income group than do Nova Scotia, New Brunswick, Manitoba, or British Columbia (35 to 37 percent each).

Table 1: Number and Proportion of Cases Having Special or Extraordinary Expenses Awarded by Percentile Group and by Province

Province	Total cases with special expenses		Proportion of cases with special expenses within income groups[1]		
			Lowest income group (less than $27,182)	Middle income group ($27,182 to $44,999)	Highest income group ($45,000 to $150,000)
	n	%	%	%	%
Nova Scotia	259	21.7	10.4	23.9	36.0
New Brunswick	190	25.9	13.8	31.8	37.5
Ontario	1,731	41.1	19.9	39.4	63.0
Manitoba	477	28.3	21.5	29.5	37.3
Saskatchewan	291	34.5	29.5	34.3	41.2
Alberta	3,455	43.1	30.7	46.1	50.4
British Columbia	174	28.5	21.3	27.0	35.2

[1] Data are categorized by percentile groups, with each group containing approximately the same number of cases. Three groups have been specified. Group 1 (below the 33rd percentile) corresponds to paying parent incomes less than $27,182. Group 2 (33rd to 67th percentile) corresponds to paying parent incomes from $27,182 to $44,999. Group 3 (over the 67th percentile) corresponds to paying parent incomes from $45,000 to $150,000.

[2] To avoid bias that may be caused by low sample sizes, distributions across income categories have not been provided for provinces or territories with fewer than 100 cases.

Source: Survey of Child Support Awards database, October 1999–February 2001.

Based on this information, provinces clearly vary in their practices and policies on including special expenses.[56]

Are the undue hardship provisions fair?

Some people are concerned about the overall fairness of the undue hardship provisions and about the consistency with which the standard of living test is applied.[57]

Unfortunately, when a claim for undue hardship is raised and subsequently fails, there may be no record of the application in the case files or reference to the application in the child support order (from which the Survey of Child Support Awards data are extracted). Thus, although the Survey of Child Support Awards contains some data on undue hardship applications (160 cases, or 0.7 percent of the total number of cases), the database does not reliably reflect the total number of cases in which undue hardship is raised.

As mentioned, undue hardship applications were identified in only 0.7 percent of the total cases in the sample of the 160, there was only one cross-application. The paying parent brought most of these applications. Of the 150 undue hardship applications brought by the paying parent, 103 resulted in a decrease of the Guidelines amount, 28 were

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[56] See also the review of the Child Support Guidelines, Section 7 "Special or Extraordinary Expenses" in Volume 2.

[57] See also the review of the Child Support Guidelines, Section 10 "Undue Hardship" in Volume 2.

denied, none resulted in an order amount higher than the Guidelines amount, and 19 applications had unknown or missing outcomes.

Of the nine undue hardship applications made by the receiving parent, one resulted in an increased amount, four were denied, and one resulted in an order that was less than the table amount. The outcome was unknown in three cases.

How are child support amounts negotiated in shared custody cases?

Once parents agree on shared custody, or a judge determines that it is appropriate, the parents must address child support.

Who enters into a shared custody arrangement?

- In the Survey of Child Support Awards, 5.8 percent of all cases had shared custody arrangements.
- Children of parents with shared custody arrangements tended to be younger than those of parents with other types of custody. When the average age of all children in a family was considered, children in shared custody were 9.96 years, compared to 10.2 years for those in sole-mother custody, 12.1 years for those in sole-father custody, and 13.7 years for those in split custody arrangements.
- On average, families with shared custody arrangements had fewer than two children. Families with split custody arrangements had the highest mean number of children (2.47), followed by sole-mother and shared (1.75) and sole-father arrangements (1.70).
- The median incomes for paying ($50,000) and receiving ($30,971) parents are higher in shared custody cases than in sole-mother custody cases ($35,799 and $23,845, respectively) and split custody cases ($42,763 and $20,855, respectively). While the median paying parent income is also lower for sole-father custody cases ($21,120), the median receiving parent income for sole-father cases is higher ($40,000).

Source: Survey of Child Support Awards database, February 2001.

Mediators were asked how they negotiated child support amounts in shared custody cases. Respondents mentioned a variety of means, but the two mentioned most often were, first, using software or family budgets for each household, and, second, calculating the proportion of the table amount for each parent that corresponds to the amount of time he or she has custody of the children. However, respondents also indicated that they found the lack of direction in negotiating support in these cases to be a big disadvantage of the Guidelines.[58]

The presence or absence of a child support order was specified in 1,226 shared custody cases in the Survey of Child Support Awards database. Of these, 56 percent reported an amount (see Table 2). A majority of these were monthly amounts. In the remaining 44 percent of cases, either there was no award or the amount depended on future circumstances.

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[58] **See: Child Support Team, 2000 (footnote 17) at p. 12.**

Table 2: Child Support Award Status in Shared Custody Cases[1]

Award status	n	%
Award amount specified	**689**	**56.2**
Per month	631	51.5
Per year	2	0.2
Lump sum	2	0.2
Other amount	54	4.4
No amount specified	**537**	**43.8**
Amount contingent on future circumstances	5	0.4
No award	532	43.4
Total	**1,226**	**100.0**

[1] Excludes cases where award status and custody type were unknown.

Source: Survey of Child Support Awards database, October 1999–February 2001.

A discussion of the issues relating to the 40-percent time threshold, and of approaches to determining amounts in shared custody cases under section 9 of the Guidelines, follows under the heading "Shared Custody".

SUMMARY

Based on information from the Survey of Child Support Awards, the table amounts are consistently accepted as the "floor" in relevant cases. There are, however, different practices and policies among the provinces and territories for including special expenses.

OVERALL ASSESSMENT

The Survey of Child Support Awards confirms that the *Federal Child Support Guidelines* have been used to determine child support orders in the vast majority of divorce cases in the selected courts.

In addition, there seems little doubt that in the vast majority of cases the child support tables have gone a long way toward ensuring that children receive a fair amount of support and toward reducing conflict and tension between parents about child support. In 94 percent of sole custody cases processed under the Guidelines, the child support amount was greater than or equal to the table amount.

The tables have also made the legal processing of cases more efficient and have helped ensure that parents and children in similar circumstances are treated consistently. This is a particularly impressive finding given that the Guidelines were introduced less than five years ago.

In more complex cases involving shared custody arrangements, or special expenses and undue hardship applications, the Guidelines allow for greater discretion in making arrangements. In these cases patterns are less clear and are probably still evolving. The federal Department of Justice is proposing changes to sections of the Guidelines that deal with special or extraordinary expenses and shared custody. These are detailed in the following section.

LOOKING TO THE FUTURE: CHILD SUPPORT RECOMMENDATIONS

The results of all the consultation and research efforts described in the previous sections lead to one conclusion: the *Federal Child Support Guidelines* have been fully implemented and have achieved their intended effects. Parents are working out their own arrangements or, when parents do go to court, the issues are more clearly defined than before.

While the Guidelines have been successful, parents, the courts, and others have identified issues that require further work to improve the Guidelines and make them fairer. Some of these issues will require fine-tuning the Guidelines to provide greater clarity while maintaining flexibility. Other issues will require continued monitoring.

> "Most agreed that the Guidelines, although needing clarification or modification in at least several respects, were, even at this early date, proving their worth and were achieving most of the goals established for them. By replacing the previous case-by-case litigation framework, it was recognized that the Guidelines have introduced a degree of objectivity into the process of settling child support issues, although there was some disagreement about the degree to which individual cases were actually easier to settle."
>
> **Source:** *The Federal Child Support Guidelines—Interim Report of the Senate Standing Committee on Social Affairs, Science and Technology*, June 1998, p. 5.

Taking into account the results of the 2001 consultation, as well as previous consultations on other issues, research results, and case law analysis, the following is recommended.

SHARED CUSTODY

RECOMMENDATION 2

No change is recommended to the "40 percent rule."

The Guidelines state that when a parent exercises access to, or has physical custody of, a child for 40 percent or more of the year, the court may order a support amount different from the amount prescribed in the Guidelines. In making such a decision, the judge considers factors including the table value for each parent, the extra costs of shared custody and the condition, means, needs and other circumstances of each parent and any child for whom support is sought.

Although the use of a threshold based on time has been criticized because of the direct link between child contact and support, no alternative has been found that demonstrably improves the test. Although many other proposals have merit, none simplifies the court process and each represents a radical departure from the status quo. Using anything other than time for the threshold test would likely result in significant uncertainty and increased litigation, contrary to the objectives of the Guidelines.

Selecting a higher time threshold such as "substantially equal" has some advantages. However, these advantages may be offset by other factors, including the potential for increased litigation over the meaning of the term, unfairness to parents with high access time, and uncertainty as to whether this would actually weaken the link between child contact time and child support. In addition, there is an established body of case law interpreting the section; parents and legal professionals are familiar with it. Nevertheless, the case law on this particular issue will continue to be monitored.

PRESUMPTIVE FORMULA

RECOMMENDATION 3

It is recommended that the current factors[59] used to determine the amount of support in shared custody situations be replaced by the use of a presumptive formula. A judge would determine the support amount by applying a prescribed formula. The formula amount would be the difference between the table values for each parent given the total number of children in the shared custody arrangement.[60]

A formula would increase predictability and certainty. The fact that it could be rebutted would maintain judicial discretion to order another amount in the appropriate circumstances. To decide whether to depart from the formula amount, the court could consider any relevant factor; the way spouses shared the child's expenses would be especially relevant. This approach was chosen to account for the increased cost of maintaining two residences for a child, rather than the split custody provision, where the table values only account for the number of children in each parent's care and not the total number of children.

SPECIAL OR EXTRAORDINARY EXPENSES

RECOMMENDATION 4

The term extraordinary should be defined to better guide parents and the court and to improve consistency across the country among families in similar circumstances.

Section 7 of the Guidelines provides that six categories of special child-related expenses can be included in the child support amount if they are reasonable and necessary in light of the child's needs, the parents' means, and any family spending pattern before the separation. Included in those categories are "extraordinary expenses" for education and extracurricular activities.

The term *extraordinary* has been interpreted differently across the country, creating some confusion and inconsistency and resulting in calls to clarify the term. Section 7 should therefore be amended to add a definition of *extraordinary*. Parents and courts will be directed to determine whether the expense is extraordinary, given the income of the parent requesting and paying for the expense. If this does not help, parents and the court will be directed to consider other factors in addition to income:

- the number and nature of the programs and activities;
- the overall cost of the programs and activities;
- any special needs and talents of the child; and
- any other similar factor the court considers relevant.

The recommended approach is consistent with the original intent of the section and with the interpretation adopted by several appeal courts. It is also the approach Manitoba took when it amended its guidelines effective July 2001. This approach would help ensure that guidelines across the country continue to be harmonized as much as possible.

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[59] Factors are listed in paragraphs (a) to (c) in Section 9—Shared Custody, Federal Child Support Guidelines:
(a) the amounts set out in the applicable tables for each of the spouses;
(b) the increased costs of shared custody arrangements; and
(c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[60] Sometimes referred to as the "set-off formula." This formula subtracts the child support amount (for all children, using that parent's income) from the other parent's child support amount, the resulting difference thus is the amount paid from the parent to the other.

DISCLOSURE OBLIGATIONS

RECOMMENDATION 5

Recipients of support for a child the age of majority or over should be required to disclose information about the child's ongoing eligibility for support. This would help reduce conflict and tension between the parents.

Many people have argued that older children getting support should be accountable and provide financial and other information to demonstrate that they are still entitled to support. Others say this is an unnecessary breach of the older child's privacy that, effectively, involves the child in the parents' litigation.

The Guidelines should be amended to require disclosure of information relevant to the child's entitlement to support. The amendment would require the recipient parent, not the child, to provide the information on the written request of the paying parent, thus insulating the child from direct involvement in the litigation. This requirement would apply in all cases where support is to be paid for children at the age of majority or over, not just in those that include special expenses.

Special expenses, such as tuition for post-secondary education, are those not covered by the child support table amount. Under the Guidelines, a section already requires parents to produce information about any special expenses. However, this provision does not require parents to produce information about ongoing eligibility and other expenses that may be paid with the table amount or another amount paid for older children.

COMPARISON OF HOUSEHOLD STANDARDS OF LIVING TEST

RECOMMENDATION 6

The Comparison of Household Standards of Living Test should be adjusted to account for certain statutory payroll deductions.

Many observers have correctly noted that the current test does not account for statutory payroll deductions. Parents should be able to deduct Canada/Quebec Pension Plan contributions and employment insurance premiums when completing the standard of living test. These statutory payroll deductions are conditions of employment and the deductions are not funds available to a household.

DETERMINING INCOME

RECOMMENDATION 7

The income sections should continue to apply as drafted, except for a minor amendment to account for situations where a parent is residing in a country that has higher effective income tax rates than those in Canada.

Under the *Federal Child Support Guidelines*, it is especially important to correctly establish a parent's income because the child support tables are based on income. The Guidelines use the paying parent's gross income to determine the table amount, which ensures that parents consider child support before any deduction. To ensure fairness for that parent, the formula used to establish the amounts in the tables takes into account provincial, territorial, and federal taxes.

In its interim report on the Guidelines, the Standing Senate Committee on Social Affairs, Science and Technology stated:

> The Committee heard some testimony concerning the difficulty of determining income for the purpose of applying the Guidelines. In particular, the problems centered on accurately assessing the income of spouses who are self-employed, a problem, of course, which is equally applicable to both parents. On the other hand, the Committee is aware that difficulties in determining income for self-employed spouses predate the Guidelines. Indeed, one witness pointed out that the Guidelines have merely brought the previous difficulties to light. That same witness felt that, overall, they have been a real improvement in the calculation of income.[61]

A substantial body of jurisprudence on income has developed since the Guidelines were put into effect. Issues that were difficult before that time, such as determining self-employment income, continue to be difficult,[62] as is calculating the income of seasonal workers, farmers, and fishers. The myriad rules (both tax- and Guidelines-related) that apply in these cases can make matters difficult and complicated.

However, the Guidelines and subsequent case law have addressed many questions, such as how to deal with capital cost allowance, carrying charges, and stock options. One such income issue involves deciding what information should be used to determine income amount: the Guidelines clearly state that the most recent information should always be used.[63] This rule has helped the courts interpret the income sections.

The majority of income cases under the Guidelines deal with imputing income, an issue lingering from the pre-Guidelines era. Although a court can impute income when a paying parent lives in a country with lower effective income tax rates than those in Canada, there is no equivalent provision if a paying parent lives in a country with significantly higher rates. This omission will be rectified.

Finally, many people feel that the disclosure requirements in the Guidelines are unfair, because the parent getting support does not usually have to disclose income information (although in certain important circumstances, he or she does).[64] More recently, the disclosure requirements have been seen to be fair and to lessen the procedural burden.[65]

In 1999, as part of the federal Department of Justice's consultations on technical issues,[66] we asked, "Should the Guidelines require the receiving parent to disclose income information to the other parent in all cases?" Less than half the respondents said that this was a significant concern.

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[61] Standing Senate Committee on Social Affairs, Science and Technology, *The Federal Child Support Guidelines – Interim Report of the Standing Senate Committee on Social Affairs, Science and Technology*, Ottawa: The Senate (Canada) 1998 at p. 12.

[62] See Justice David R. Aston, "*An Update of Case-Law Under the Child Support Guidelines*" (1998), 16 C.F.L.Q. 261.
"The Guidelines do provide a useful checklist and have provided specific reference in the past for adjustments such as adding back into income items such as capital cost allowance (in the absence of evidence that the asset is really depreciating in value), wages paid to a second spouse, investment and rental property losses, car allowances and the value of personal use of a vehicle expensed for business purposes, and other personal expenses paid by a corporation, such as travel, meals and the like.
Determination of the real income of self-employed persons is not a new problem since the introduction of the Guidelines, but the Guidelines necessitate some actual finding of income (section 13) which may necessitate a closer analysis and actual reasons than in the past, and even for interim orders."

[63] Federal Child Support Guidelines Subsection 2(3) states: "Where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used."

[64] Disclosure is required when one of the parties is seeking special expenses or is claiming undue hardship, split custody, or shared custody. It is also required when the income of the support payor is greater than $150,000.

[65] In writing about the Guidelines rule that, with exceptions, only the payor's income is relevant to the calculation of the basic table amount, the Senate Committee stated the following:
"We have already noted that controversy over the original decision has abated considerably, and it may be that time will prove the choice to have been a wise one, particularly in straightforward cases where having to assess only one income doubtless simplifies the calculation considerably." (Standing Senate Committee on Social Affairs, Science and Technology, June 1998, (footnote 61) at p.16.)

[66] Child Support Team, 1999 (footnote 53).

Since May 1, 1997, several of the income sections in the Federal Child Support Guidelines have been amended to clarify them and make them easier to apply. For a detailed explanation of these amendments, see the section-by-section review of the Guidelines in Volume 2. This review reveals that, generally, the income rules are clear, are consistent from a policy perspective, and provide enough flexibility to take into account different situations.

Any difficulties are caused not so much by the rules set out in the Guidelines as by evidentiary conflicts and competing policies, such as issues related to proper and timely financial disclosure, whether unemployment or underemployment is intentional, how much capital should remain in a business, or the fine line between business and personal expenses. If the Government tried to address these countless income scenarios in the income rules, it would unnecessarily complicate the process and there would still be problems with parents intent on thwarting the system.

ACCESS COSTS

RECOMMENDATION 8

The provision dealing with unusually high access costs in the undue hardship section should continue to apply as presently drafted.

The undue hardship provision recognizes that, in some circumstances, paying the table amount, or the table amount plus special expenses, can cause a parent or a child to suffer undue hardship. This section permits courts and parents to decide on a different amount, in appropriate cases, to relieve this hardship. The undue hardship provision reflects the Guidelines' objectives of consistency and a fair standard of support, while taking into account the particular circumstances of any given family.

The undue hardship provision has been criticized because it has been restrictively applied to spouses who seek to decrease the support amount, notably when access costs are high for paying parents who reside far from the child. Courts are presently reviewing these situations case by case. For the most part, they are applying the section as intended.

When the paying parent resides far from the child, courts sometimes provide for high transportation costs through a separate order, not as part of the child support order. Normally, such an order would require parents to share these expenses in proportion to the parents' incomes. This compensation is provided after the money has been spent. Because it is difficult to predict transportation costs, child support should not be reduced without knowing whether the amount is reasonable and whether it was actually incurred.

SPOUSE WHO STANDS IN THE PLACE OF A PARENT

RECOMMENDATION 9

The provision dealing with the child support obligation of a spouse who stands in the place of a parent should continue to apply as presently drafted.

The *Divorce Act* defines a child of the marriage (a child eligible to receive child support) as a child of two spouses or former spouses, including "any child of whom one is the parent and for whom the other stands in the place of a parent." Once it has been established that a step-parent "stands in the place of a parent," the step-parent's obligations are similar to those of the natural parent.

The *Federal Child Support Guidelines* allow courts to set an appropriate child support amount. Courts must take into account the amount set out in the Guidelines and the legal duty of any parent other than the step-parent to support the child.

Courts have adopted a variety of approaches to this issue and, in light of the resulting inconsistencies, some people have argued that the regulations should give judges explicit direction about how to determine the amount of support for step-children. However, allocating child support among natural parents and step-parents is such a complex task that the process is largely driven by the facts of each case. Most respondents worried that a rigid formula could create unfair results. For all of these reasons, this section should not be amended.

II. SUPPORTING FAMILY JUSTICE SERVICES

THE FEDERAL ROLE IN SUPPORTING ENFORCEMENT ACTIVITIES IN CANADA

For the family law justice system to work, family support obligations must be enforced so that parents pay their support fully and on time to children and their families. In Canada, the provinces and territories collect and disburse payments through maintenance enforcement programs. Over the past six years, the Government of Canada has taken a more active role, providing important legislative, operational, and coordinating activities that help provinces and territories improve compliance and, thereby, stabilize families experiencing family breakdown.

Currently, no "national" statistical default rate provides information on the number or proportion of cases of non-compliance, let alone the nature of the default.[67] However, it is generally agreed that between 25 to 30 percent of cases registered with the provincial and territorial Maintenance Enforcement Programs (MEP) receive full payment on time. Another 60 percent of cases involve some sort of default, but some money has been paid within the last year. The remaining 10 to 15 percent of cases involve parents who have either not made a payment in the last year or never made a payment. These proportions fluctuate from jurisdiction to jurisdiction for a number of reasons, including the way jurisdictions run their programs, their enforcement policies, the volume of cases, and provincial and territorial resources.

The Government of Canada has been providing the provinces and territories with legislative, operational, and funding support since launching the administrative MEPs in the early 1980s. On May 1, 1997, new federal measures substantially expanded the Government of Canada's role in promoting compliance with family support obligations. The Government has helped families to benefit from fairer child support amounts under the new child support guidelines and to receive their support payments in full and on time. To do this, it enhanced federal support enforcement laws, re-engineered the federal enforcement operational system to improve service, established a federal enforcement policy unit, increased project-based funding, and launched a comprehensive program of research on enforcement and compliance issues.

This report summarizes how the Government of Canada has addressed the needs of separated and divorced families in the area of compliance and enforcement of support obligations, and recommends ways to better achieve this objective in the future.

RECENT CHANGES TO THE FEDERAL ENFORCEMENT LAWS AND OPERATIONAL SYSTEM

The Family Law Assistance Services (FLAS) Section of the federal Department of Justice runs the federal enforcement program services that underlie the *Family Orders and Agreements Enforcement Assistance Act* (FOAEA) and the *Garnishment, Attachment and Pension Diversion Act* (GAPDA). This federal enforcement legislation provides a unique set of programs that benefit thousands of Canadians, including children, who otherwise would suffer the consequences of unpaid support payments.

To enhance its role, the Government of Canada amended both these acts in May 1997 so that it could provide the provinces and territories with additional federal enforcement measures. These amendments also removed technical and procedural barriers that kept the Government from making existing measures more timely and efficient.

[67] **The Canadian Centre for Justice Statistics of Statistics Canada is currently implementing an on-going survey with the provincial and territorial Maintenance Enforcement Programs (MEP) that will provide standardized definitions for compliance and non-compliance with support obligations.**

Before the amendments, the FOAEA gave governments tools to find individuals who are not respecting a family provisions (support, custody or access) order. FOAEA also provides for garnishment of federal payments in order to satisfy family support obligations. The amendments streamlined and improved the garnishment procedures. They also allowed the Government to search the Canada Customs and Revenue Agency databanks for information on individuals who are in default of a family support provision and to investigate a parental child abduction charge under the *Criminal Code*.

The amendments also introduced a new enforcement tool. Governments can now deny or suspend passports and specific federal licences to ensure compliance with family support orders and provisions.

The GAPDA allows the Government of Canada to garnishee and attach federal salaries and to divert pension benefits payable under the federal *Superannuation Act* to satisfy family support orders. The 1997 amendments streamlined notice requirements for garnishment of federal salaries and removed restrictive residency requirements for applicants for pension division. To help families whose support payments are in persistent arrears, the amendments included a special provision to allow pensions to be diverted before the pension becomes payable.

Before May 1997, the provinces and territories filled out forms manually to apply for these services. Staff in the FLAS office then key-captured this information and forwarded it on tapes to the participating federal agencies and departments, such as the Canada Customs and Revenue Agency and Human Resources Development Canada.

This system worked, but improved technologies would make it work even better and faster. In May 1997, federal funding made it possible for different levels of government to take enforcement on-line and to speed the transfer of money to recipient families once a garnishee summons has identified federal moneys. By 1999, the computer system was adapted to the Web and made available to the provincial and territorial enforcement programs. This Web-enabled system gave governments the following benefits:

- speedier transfer of information between the FLAS and its clients in the MEPs and in other federal departments;
- immediate access to case status information concerning FOAEA garnishment, tracing, and licence denial activity;
- elimination of the need to fill out applications manually;
- use of on-line or batch filing of application information to transfer information to and from the FLAS operational system, which eliminated the errors and omissions of manual processes; and
- infrastructure that gives provinces and territories an avenue for on-line, secure communication.

FEDERAL ROLE WITH PROVINCES, TERRITORIES, AND OTHER PARTNERS

One of the biggest challenges in the area of maintenance enforcement is to ensure consistency of policies and programs. Each province and territory has its own maintenance enforcement program and legislation to back it up. But enforcing maintenance requires consistent, uniform policies and programs across the country. The establishment of a federal policy unit in the federal Department of Justice has been an important component of the enhanced federal measures on enforcement. Its larger presence allows the Government of Canada to better respond to the needs of families. It has ensured greater coordination of provincial, territorial, and federal efforts to improve compliance nationally and internationally.

The Department has worked to:

- speed up federal policy development based on the previously identified needs of the provinces and territories;
- promote the exchange of information between federal, provincial, and territorial enforcement services;
- administer and coordinate the efforts of various federal-provincial-territorial and international forums; and
- help develop new legislation to improve service delivery to recipients and paying parents.

Since 1997, federal Department of Justice officials have participated in, and often chaired, the activities of three inter-governmental groups—the Federal-Provincial-Territorial Task Force Enforcement Subcommittee (the Enforcement Subcommittee), the Federal-Provincial-Territorial Reciprocal Enforcement of Maintenance Orders/Reciprocal Enforcement of Support Orders (REMO/RESO) Working Group, and the MEPs Directors.

These groups worked well together to produce a more cohesive approach to enforcement. The various committees brought about a better understanding of the areas of concern that allowed them to prioritize and develop action plans for their work. The provinces and territories said federal participation was integral to the groups' success.

The Enforcement Subcommittee worked on many important joint initiatives and reforms. For example, it worked on amending banking legislation to make it easier to serve support order documentation on banking institutions. The subcommittee also prepared a document called *Operation Principles and Goals* (OPG). The OPG "operationalizes" the Inter-Jurisdictional Maintenance Establishment and Enforcement Protocol adopted by FPT Justice Ministers in September 2000. These documents will make it faster and more efficient to enforce inter-jurisdictional support orders nationally.

The Government of Canada has also been bringing provincial and territorial governments together to make it easier for them to reach agreements with other countries. In an increasingly mobile world, the provinces and territories are ensuring Canadian support obligations are respected by establishing more than 390 reciprocal agreements with American state governments and another 260 with European, Asian, African, Caribbean, and South Pacific national or state governments.

Through the Federal-Provincial-Territorial REMO/RESO Working Group, the Government of Canada has made it easier for different jurisdictions to reach agreement. It has done this by organizing in-person meetings (five so far since 1998) between working group members and foreign jurisdictions. Members negotiate reciprocal enforcement of support orders and recommend new foreign jurisdictions for future agreements. So far, the annual meetings have attracted participants from the United States, Ireland, the Czech Republic, Slovakia, Norway, Poland, Italy, Switzerland, Australia and the United Kingdom.

With federal coordination and support, the REMO/RESO Working Group has established important links domestically and internationally. It has developed uniform information materials and processing tools, which have been shared nationally and internationally, highlighting the need for more such tools.

NEW UNIFORM RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS STATUTE

For a number of years, the Federal-Provincial-Territorial Family Law Committee has been working on uniform reciprocal enforcement of maintenance orders legislation. This new legislation will replace each jurisdiction's present Reciprocal Enforcement of Maintenance Orders (REMO) legislation. The new legislation will significantly streamline the process by which support orders are obtained, varied, and recognized in inter-jurisdictional cases, nationally and internationally.

At their September 2000 meeting, provincial and territorial deputy ministers of justice agreed to consider the new uniform *Inter-Jurisdictional Support Orders Act* (ISO). The federal Department of Justice supported and participated in sharing information about this Act, and it examined the Act's impact on related federal legislation and on the way support orders are enforced in Canada.

At their August 2001 meeting, the premiers decided to put new inter-jurisdictional support enforcement legislation in place by fall 2002. Provincial and territorial representatives have identified the need for ongoing federal involvement to assist in implementing activities to do so.

DIVORCE ACT

RECOMMENDATION 10

Federal legislation should harmonize with the new provincial/territorial legislation to resolve inter-provincial and extra-provincial support cases. Governments may also want to reconsider all the inter-jurisdictional sections of the Divorce Act.

When parties do not live in the same province or territory, they can use sections 18 and 19 of the *Divorce Act* to vary an existing order under the Act. If the court is satisfied that the issues can be adequately determined, a party can apply by using a two-stage process. First, one party (the applicant) applies to a court in his or her jurisdiction outlining a claim for a variation of the existing order. The request is then sent to the court closest to where the other party (the respondent) lives. A hearing is set in the second court, where the respondent can give evidence. The second court may then approve, deny, or vary the applicant's request and make an order accordingly.

This variation process was intended to give the applicant an affordable, accessible method of variation. It was based on similar procedures in existing provincial and territorial (REMO) legislation. However, the convenience of the two-stage procedure has been undermined by lengthy delays and the cumbersome hearing procedure. Evolving case law has also highlighted problems with those sections of the Act dealing with the jurisdiction of the court.

As noted, the provincial and territorial premiers plan to bring in new inter-jurisdictional support enforcement legislation by fall 2002. Since changes to REMO legislation will streamline the processes for establishing and varying support orders, there may need to be complementary amendments to the *Divorce Act*.

WORKING WITH OTHER PARTNERS

The federal Department of Justice worked closely with officials of other federal departments and other governments to better understand the importance of outstanding issues and initiatives related to federal policy and programs on enforcement. Some initiatives are being pursued, while others have been assigned a lower priority or discarded altogether.

For example, the Government has long wanted to amend the compulsory payments parts of the *Queen's Regulations and Orders for the Canadian Forces*. This amendment will make it easier to enforce support orders by removing the requirement for a creditor to get a separate court order on arrears of support.

Other work has involved helping the RCMP assess the costs of recovering passports debtors have surrendered under the new passport denial and suspension program. Also, the federal Department of Justice and the Canada Customs and Revenue Agency are continuing to study the idea that paying parents in default should have to file an income tax return, which was recommended by the Standing Senate Committee on Social Affairs, Science and Technology.

RESEARCH ACTIVITIES ON SUPPORT ENFORCEMENT

During the Child Support Initiative, the Government of Canada extensively studied support enforcement issues to better inform policy discussions, improve program delivery, and inform the general public on enforcement issues. Before it did these studies, there was little research or national data available on family law issues, especially on enforcement or compliance.

The research had two major components. One component dealt with monitoring the impact of amendments to federal enforcement legislation, as well as the impact of improvements in methods used to exchange information between provincial MEPs and FLAS. The second component examined the determinants of support compliance and looked for ways to improve federal "trace and locate" information provided to the provinces.

A number of studies looked at the tracing and licence denial reforms. These studies looked at outcomes (such as "location of debtor" and "payments made") of a random sample of federal trace requests. The studies investigated how the current use of social insurance numbers affects the validation of FOAEA applications. They also studied the idea of instituting standard monthly and quarterly management reports on tracing, interception, and licence denial services.

One study showed that changes to the FOAEA computer system had improved its operational efficiency. However, the study also identified improvements that would take full advantage of the new system. It also showed that data extracted from the Canada Customs and Revenue Agency are most valuable to the MEPs for locating debtors' places of employment. The new federal licence denial scheme has been especially useful to the MEPs and has produced considerable results on a number of difficult cases.

By studying why people pay or do not pay their child support, the Government can improve programs and policies. Five provinces are collaborating in a federal study that is collecting detailed case information from the provinces' respective operational information systems. Cases are sorted by compliance status, and then both paying parents and recipients are interviewed by telephone to create profiles of "high compliance payors" and "low compliance payors." Preliminary results show that "high compliance payors" have some of the following characteristics:

- they began paying child support immediately after separation;
- they spent a lot of time with their children; and
- they provided a real "second" home to the children.

Data are currently being collected from the last two provinces, which will effectively double the current sample of parent interviews. These additional data should help confirm some of the preliminary findings and provide other avenues of analysis to pursue. The final report for this project is scheduled for release in 2002.

The other major project was a feasibility study on developing and creating a "new hires" program in Canada to trace debtors.[68] The study consisted of three components:

- assessing the need for such information based on interviews with provincial enforcement program officials;
- examining the criteria used in American state and federal new hire programs; and
- assessing federal databases for their suitability as sources of "new hire" information.

The study recommended that the best data source for "new hire" information in Canada would be the Human Resources Development Canada (HRDC) databases. These databases frequently and quickly get "new hire" and "re-hire" data from employers. HRDC uses these databases to detect overpayment of employment insurance.
The Department of Justice and HRDC are presently discussing issues related to the implementation of the "New Employee Tracing Program." Administrative, technical and privacy issues will be addressed during these discussions.

STATISTICS CANADA'S MAINTENANCE ENFORCEMENT SURVEY

RECOMMENDATION 11

Statistics Canada, working with its partners in the National Justice Statistics Initiative, should continue to explore options for collecting and disseminating information on family law issues.

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[68] **A "new hires" program matches employer data or recently new or re-hired employees with debtor data to find a place of employment for immediate garnishment purposes.**

In the early 1990s, the Canadian Centre for Justice Statistics, working with its federal provincial-territorial partners in the National Justice Statistics Initiative began feasibility work to explore options for collecting data on family law issues. As part of the Child Support Initiative, the Maintenance Enforcement Survey (MES) was undertaken.

The survey provides a much-needed overview of the characteristics and financial status of support orders, as well as of enforcement activities in Canada. More specifically, the survey provides information on caseload, case flow, and case characteristics (such as reciprocal status, type of recipient, source of orders, etc.). As well, the survey reports on various financial aspects of cases, such as payment history, amount of arrears, length of time since last payment, and some data on types and number of enforcement actions. It represents the first data to standardize definitions across MEPs for such important concepts as default and compliance.

FUTURE FEDERAL ROLE IN SUPPORTING PROVINCIAL AND TERRITORIAL SUPPORT ENFORCEMENT ACTIVITIES

The coming years will be crucial in the development of a national infrastructure for enforcing family support. To maintain the recent progress of all levels of government toward a more coordinated and uniform enforcement system, the Government of Canada needs to continue to assume a national coordinating role. The provinces and territories expect sustained federal involvement.

RECOMMENDATION 12

The Government of Canada should:

- ***work with the provinces and territories and other countries to develop uniform enforcement initiatives that promote compliance and that improve the collection of moneys on behalf of recipients and their children;***
- ***support the provinces and territories in their enforcement efforts by improving the federal enforcement operational system;***
- ***better integrate the concept of compliance in the family law system by promoting the exchange of information among enforcement services and other federal-provincial-territorial groups dealing with related aspects of family law;***
- ***support collaborative activities with other federal departments and agencies and with national organizations focused on educating the public and on giving Canadian enforcement issues a higher profile;***
- ***show leadership in efforts to develop international agreements for reciprocity between Canada and other countries; and***
- ***continue research on enforcement and other issues related to compliance, in collaboration with the provinces and territories and other countries, to improve understanding of support enforcement.***

For more information on the federal role in supporting provincial and territorial support enforcement activities, please see "Federal Role in Support Enforcement in Canada" in Volume 2.

FEDERAL FUNDING OF FAMILY JUSTICE SERVICES

Through financial assistance, the Government of Canada has supported "family justice services" as a way to ensure that the family justice system addresses the needs and best interests of children in circumstances of separation and divorce. These programs and services help reduce conflict between parents, encourage parents to settle their disputes out of court when appropriate, and increase compliance with family support obligations. Federal funding has supported important court-based programs, community services, and enforcement activities developed and run by the provinces and territories, such as parenting education courses and mediation.

A key element that helped governments implement the *Federal Child Support Guidelines* was the Child Support Implementation and Enforcement Fund. In effect from April 1996 to March 2000, it provided financial assistance to provincial and territorial governments to cover part of the costs of implementing child support guidelines and new enforcement measures.

In April 2000, the Child Support Implementation and Enforcement Fund was replaced by the Child-centred Family Justice Fund. The new fund enlarged the focus of federal funding from implementing child support reforms to developing a better, more integrated set of family justice programs and services to deal with child custody and access, child support, and support enforcement issues.

Volume 2 includes more detailed information on federal funding activities and some insight into the services available to divorced and separated parents.

CHILD SUPPORT IMPLEMENTATION AND ENFORCEMENT FUND

The Child Support Implementation and Enforcement Fund made up to $50 million available for activities that helped governments implement the child support Guidelines. This money allowed the provinces and territories to work with the Government of Canada on innovative, cost-effective programs, services, and procedures that help parties get child support orders and variations to existing orders.

The rest of the fund—$13.6 million—was set aside for innovative, cost-effective enforcement measures and processes, including national and international reciprocal enforcement of support orders.

For these resources, the federal Department of Justice and the provincial and territorial governments established an annual population-based allocation target for each province and territory.

Principles

As part of the framework for managing the financial assistance program, the federal Department of Justice has identified 11 principles to guide all governments as they decide what projects to propose and approve under the funding program.

- The needs and well-being of children are paramount.
- No one framework of post-separation parenting will be ideal for all children.
- Programs and services must be sensitive to the fact that children and youth experience separation and divorce at different stages of development. The programs and services must protect them from violence, conflict, abuse, and economic hardship.
- An integrated approach to planning and delivering child support, support enforcement, and custody and access programs and services is encouraged to respond to the long-term service needs of children and families.
- We should encourage mechanisms for resolving non-adversarial disputes early.
- Activities should address the need for evaluation, project monitoring, and performance measures.
- Research should advance the family law community's knowledge of specific issues, inform policy and program discussions, help develop or refine policies or programs, and enhance legislative clarity.

- Participants in the family justice system (families, judiciary, bar, court staff, enforcement staff, mediators, and others) should be well informed about family justice reforms.
- We should promote coordinated national, inter-jurisdictional, and international approaches to innovative family justice services and information sharing.
- We need alternatives or modifications to the present court dispute resolution system to reduce cost and delays for parents.
- Programs and services should be efficient and cost effective for the justice system.

In addition, the Government of Canada has worked with the provinces and territories on criteria to help the federal Department of Justice ensure that funded activities support federal objectives, while offering the provinces and territories the benefit of predictability in their year-to-year planning. The following were the priorities of the Government when it implemented the Fund.

- *Coordination*: coordinating activities to implement the Federal Child Support Guidelines.
- *Enhancing existing services*: developing or improving existing client and court services to meet workload increases.
- *Provincial and territorial guidelines*: adopting provincial guidelines that parallel the Federal Child Support Guidelines.
- *Public information*: supporting public awareness and understanding of the Federal Child Support Guidelines.
- *Innovative approaches*: developing, testing, implementing, monitoring, and evaluating innovative ways to meet the demand for variations to existing support agreements and orders, and for new agreements and orders.
- *Monitoring*: monitoring the effects of the legislative changes.

The following were the priorities of the Government for the enforcement component of the Child Support Implementation and Enforcement Fund.

- *FOAEA enhancements*: developing and enhancing provincial and territorial computer systems and applications used to access services under the *Family Orders and Agreements Enforcement Assistance Act.*
- *Monitoring*: monitoring the effects of system and administrative changes, and of enhancements to enforcement mechanisms.
- *Maintenance Enforcement Survey*: supporting changes to provincial and territorial information systems designed to meet the data-collection requirements of the national Maintenance Enforcement Survey managed by the Canadian Centre for Justice Statistics.
- *Innovative approaches*: testing innovative approaches to improving support enforcement mechanisms.
- *Public information*: delivering public legal education and information to increase awareness of changes in Maintenance Enforcement Programs.
- *Responses to workload increases*: changing administrative processes, upgrading systems, adding staff, and enhancing services to meet anticipated demands for variations and new child support orders.

CHILD-CENTRED FAMILY JUSTICE FUND

All levels of government recognize the need to integrate family justice services to better help parents and children when parents separate and divorce. This recognition led governments to expand the scope of the funding program.

When the child support Guidelines were put in place, provincial and territorial governments modified existing programs and services. They also tested and implemented new approaches. Many of these services can address child custody and access issues, as well as child support and maintenance enforcement. For example, many jurisdictions have introduced parent education programs or broadened existing programs to include child support information and to stress front-end solutions such as consent orders.

Similarly, both child custody cases and child support cases can be effectively resolved with mediation services and other alternative program delivery strategies that increase the involvement of both parents in their children's lives. Recognizing this, and the need to develop and stabilize such services throughout Canada, the Government of Canada changed its funding to include custody and access services, as well as support and maintenance enforcement services.

The Child-centred Family Justice Fund, introduced in 2000–01, has three components.

- *Family Justice Initiatives*: These activities build on recent, successful collaborative efforts to help provinces and territories develop, pilot, implement, and evaluate family justice programs and services that deal with private family law matters in cases of separation and divorce. These programs and services include child support and support enforcement, as well as reciprocal enforcement, custody, and access activities that promote the best interests of children.
- *Incentive for Special Projects*: This funding develops alternative provincial and territorial mechanisms for resolving disputes, particularly processes for determining, varying, or recalculating the amount of child support.
- *Public Legal Education and Information and Professional Training*: This funding enhances knowledge, develops materials, and informs Canadians—including the legal community—about child support guidelines, support enforcement measures and programs, custody and access services, and related family justice matters. The federal Department of Justice also funds community organizations, professional associations, and other non-governmental groups involved in promoting public awareness and education, or professional development and training for family law professionals.

FAMILY JUSTICE INITIATIVES—PRIMARY AREAS OF ACTIVITY

The Family Justice Initiatives component is structured and managed the same way as the earlier Child Support Implementation and Enforcement Fund was. In other words, each jurisdiction gets part of the available funds based on its population. It must submit and obtain approval of the projects it proposes to implement or maintain in that year, and the projects must fall within one of the eight priority areas normally eligible for funding, as follows.

- *Coordination:* This funding is used to coordinate child support, support enforcement, and custody and access activities.
- *Consultations:* This funding is used for joint federal, provincial, and territorial consultations on family law.
- *Service enhancements and innovations:* This funding is used to enhance innovative child support, support enforcement, and custody and access activities under an integrated services framework, or to develop, test, implement, monitor, and evaluate new activities.
- *Alternatives for determining support amounts:* This funding is used to enhance alternative mechanisms for determining, varying, or recalculating the amount of child support, or to pilot and establish new mechanisms.
- *Enforcement:* This funding is used to enhance innovative support enforcement activities, or to develop, test, implement, monitor, and evaluate new activities.
- *Reciprocal enforcement:* This funding is used for provincial and territorial efforts in reciprocal enforcement.
- *Policy and research:* This funding covers legislative and policy development, as well as research, monitoring, and evaluation activities related to child support, support enforcement, and custody and access.
- *Public awareness and training:* This funding is used to promote public awareness and understanding of child support, support enforcement, and custody and access issues, procedures, and services.

INCENTIVES FOR SPECIAL PROJECTS

The Incentives for Special Projects component encouraged innovation among provincial and territorial services through a competitive process. As mentioned previously, this component develops alternative mechanisms for resolving disputes at the provincial and territorial levels, including processes for determining, varying, or recalculating child support. Recalculation frameworks must be timely, cost efficient for parents, and accessible to parents. They should also make it easier for parents to agree on the amount of child support.

SERVICES TO HELP THE COURTS DETERMINE AND RECALCULATE CHILD SUPPORT AMOUNTS: SECTION 25.1 OF THE *DIVORCE ACT*

The *Divorce Act* was amended in 1997 to provide for agreements between the federal, provincial, and territorial governments to set up a provincial child support service that would help the courts determine child support amounts and that would periodically recalculate child support orders based on updated income information.

"Provincial child support service" is defined broadly in subsection 2(1) of the *Divorce Act* and "means any service, agency or body designated in an agreement with a province under subsection 25.1(1)." It allows a wide scope for provinces and territories to designate an agency appropriate to their particular context.

Section 25.1 also outlines the procedure for recalculating the amounts in a child support order. It was included in the *Divorce Act* in 1997 to respond to two concerns:

- a possible court backlog of variation applications once the Federal Child Support Guidelines came into effect;[69] and
- research in the United States that linked inadequate child support to infrequent updating of child support amounts (child support amounts in Canada were rarely updated because of the prohibitive financial and emotional costs of variation proceedings).

In June 1998, the Federal-Provincial-Territorial Task Force on the Implementation of Child Support Reforms reviewed the application and implementation issues arising from section 25.1.

The provinces and territories realized that the concept of a child support service as set out in section 25.1 was not clear. They also found that a child support service or other mechanism for improving the child support dispute resolution process could not be developed in isolation from initiatives to improve the dispute resolution process for other issues affecting separated or divorcing parents, particularly custody and access.

The provinces and territories intended to share information and to develop faster, cheaper, and more consensual ways to resolve all family law issues, not just child support.

The work of the federal, provincial, and territorial governments in this area since 1997 has confirmed that integrated services are required to help families resolve parenting disputes and child support issues. Integration gives families alternatives to adversarial court processes. It is based on the premise that child support issues are often related to issues of parenting after separation and divorce.

In a child-focused approach, protecting the best interests of children must remain the primary consideration of decision makers when they are determining parenting arrangements. Giving parents an opportunity to resolve disputes without going to court may reduce the negative impacts of conflict that often occur after separation. Services such as counselling, mediation, and parent education programs can give parents the necessary tools and information to resolve disputes relating to parenting their children after family breakdown.

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[69] In fact, the expected flood of variations did not occur, but data obtained during the pilot phase of the *Survey of Child Support Awards* (December 1997 to October 1998) show that the most common reason given for variation applications during this period was the implementation of the Guidelines. Thirty-five percent of variation cases collected during the pilot phase of the Survey gave "implementation of the guidelines" as the reason for the application (Hornick, Joseph P., Lorne D. Bertrand, & Nicholas M.C. Bala, *The Survey of Child Support Awards: Final Analysis of Pilot Data and Recommendations for Continued Data Collection. Enquête sur les pensions alimentaires pour enfants: analyse finale des données de l'enquête pilote et recommendations concernant la collection de données,* Ottawa: Department of Justice Canada, Child Support Team, 1999 (CSR-1999-2E/2F)). It should be noted that the coming into force of the Guidelines is a circumstance that allows parents or the court to change the child support amount. No other reason is necessary.

Because it is often impossible to separate child support issues from issues related to parenting of children after separation or divorce, some provincial programs have been able to build on and expand existing services in their jurisdictions to assist parents with issues related to their children after family breakdown. The shift towards integration of services in the provinces and territories is in keeping with the work of federal, provincial and territorial governments to promote existing services and to develop new services to help families undergoing separation or divorce with issues relating to the parenting of their children.

Through the Child-centred Family Justice Fund, some provinces have set up pilot projects to determine and recalculate child support amounts or to encourage early resolution of disputes to develop innovative ways to provide more efficient, consensual, and integrated family dispute resolution processes.

For a description of the various pilot projects in the provinces and an overview of experiences or frameworks in other countries, see Volume 2.

FUNDING ALLOCATIONS

In 1996–97, before Bill C-41 went into effect, the federal Department of Justice and the provincial and territorial governments established an annual allocation target for each province and territory based on its population. The original allocations have been adjusted to accommodate changes in provincial and territorial planning assumptions and experience. The Department was also able to identify small surpluses in some jurisdictions that were then made available to other jurisdictions that needed more money because of greater demand. The following table identifies the actual allocations by jurisdiction for the period ending in 1999–2000, as well as projected transfers for 2000–01 through 2002–03.

Table 3: Federal Funding of Family Justice Services

Child Support Implementation and Enforcement Fund and Child-centred Family Justice Fund

Province	1996–97	1997–98	1998–99	1999–2000	2000–01	2001–02	2002–03	TOTAL
British Columbia	20,000	1,610,478	3,003,501	1,928,133	1,726,133	1,807,591	1,726,133	11,821,969
Alberta	0	1,614,476	1,675,806	1,459,368	1,419,078	1,407,998	1,279,578	8,856,304
Saskatchewan	25,350	688,287	664,305	366,844	508,698	596,844	476,698	3,327,026
Manitoba	7,000	714,719	667,358	644,300	532,530	577,156	532,530	3,675,593
Ontario	0	6,248,734	4,525,321	3,610,133	4,910,133	5,237,401	5,144,287	29,676,009
Quebec	0	4,786,673	4,776,810	3,452,735	2,826,530	4,167,892	3,427,735	23,438,375
Nova Scotia	0	462,133	709,900	439,809	417,809	481,830	439,809	2,951,290
New Brunswick	5,500	340,334	449,753	470,647	410,464	396,200	356,543	2,429,441
P.E.I.	5,000	128,118	268,001	197,430	195,000	181,765	150,000	1,125,314
Newfoundland	0	297,537	404,903	323,276	273,276	310,196	273,276	1,882,464
Yukon	0	143,118	90,000	83,000	272,647	180,391	150,000	919,156
N.W.T.	0	119,500	226,176	144,471	145,000	210,532	150,000	995,679
Nunavut	0	0	0	138,118	137,673	220,345	150,000	646,136
TOTAL	62,850	17,154,107	17,461,834	13,258,264	13,774,971	15,776,141	14,256,589	91,744,756

APPENDIX 1: CHRONOLOGY OF EVENTS LEADING TO THE TABLING OF THE REPORT

1990	Federal-Provincial-Territorial Deputy Ministers of Justice give the Federal-Provincial-Territorial Family Law Committee (the Family Law Committee) a mandate to study the issue of child support.
1991	The Family Law Committee releases a report, *Child Support: Public Discussion Paper*, which provides a basis for public consultation.
	The Family Law Committee commissions studies of four expenditure frameworks, which could determine the costs of raising children in Canada.
1992	The Family Law Committee releases its second report, *The Financial Implications of Child Support Guidelines.*
	The federal Department of Justice completes *The Construction and Implementation of Child Support Guidelines*, which summarizes research results. This report is presented to the Family Law Committee.
1993	The Family Law Committee rejects the four expenditure frameworks in favour of one of the equivalence scales used by Statistics Canada. The 40/30 scale is combined with the four apportioning approaches noted above to produce four formulas. Awards generated by the four formulas are compared to current levels of child support. The Revised Fixed Percentage formula emerges as the preferred child support formula.
1994	The *Thibaudeau* decision is announced. The Family Law Committee asks researchers at the federal Department of Justice to examine an alternative child support formula where the non-custodial parent would not deduct child support payments from his or her income and the custodial parent would not include child support as income.
	The Family Law Committee completes its final report on child support and forwards it to the deputy ministers of justice, the ministers of justice, and the solicitors general.
1995	The federal Department of Justice releases its final report, *An Overview of the Research Program to Develop a Canadian Child Support Formula*, which summarizes the research done to develop child support guidelines.
	The Family Law Committee releases its *Report and Recommendations on Child Support*, which summarizes its work on the Child Support Project.
1996	In March, as part of the federal budget, the New Child Support Package is made public. The package changes the way child support is treated for tax purposes, introduces child support guidelines and new enforcement measures, and increases government spending on benefits for low-income families with children.

1997	The Standing Senate Committee on Social Affairs, Science and Technology studies Bill C-41 and recommends, among other things, that custody and access issues be studied further and that the Committee monitor how Bill C-41 and the Federal Child Support Guidelines are implemented and applied.
	Bill C-41 is passed and the Federal Child Support Guidelines come into effect on May 1. Amendments to the *Income Tax Act* are passed. For tax purposes, parents paying child support will no longer deduct the child support amounts paid from their income and recipients will no longer include the amount of child support received in their income.
1998	In June, the Standing Senate Committee on Social Affairs, Science and Technology releases an interim report on the Federal Child Support Guidelines.
	As promised by the federal Minister of Justice, the *Child Support Initiative Research Framework Discussion Paper* is widely distributed for comment. The paper was prepared in close consultation with federal, provincial and territorial officials responsible for implementing the Child Support Initiative.
1999	The final *Child Support Initiative: Research Framework* is published and made available on the Internet.
	In October, the federal Department of Justice consults on technical issues related to child support, releasing *Federal Child Support Guidelines: A Review of Technical Issues and Proposed Solutions*.
2000	The Government of Canada announces in February that it is prepared to provide the provinces and territories up to $29 million over the next two years to expand court-based programs and to support community services. This expansion focuses on integrating child support, support enforcement, and custody and access services.
2001	In January, in the Speech from the Throne, the Government of Canada states that it will work with its provincial and territorial partners to modernize the laws for child support, custody, and access.
	The Family Law Committee launches public consultations on custody, access, and child support. The consultations begin in April with the release of a written consultation document distributed across Canada. In-person consultations in every province and territory are held from April to June.
	Custody, Access and Child Support in Canada: Report on Federal-Provincial-Territorial Consultations is released.
2002	The federal Department of Justice tables *Children Come First: a Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines.*

APPENDIX 2: CHANGES IN TAXATION RULES FOR CHILD SUPPORT

(Provided by the Federal Department of Finance)

INTRODUCTION

The child support reform package, announced in the 1996 budget, included new rules for the taxation of child support and an enrichment of the Child Tax Benefit. This appendix describes: the old rules for the taxation of child support and the rationale for changing them; the new tax rules; the enrichment of the Child Tax Benefit; and, the impact of the new tax rules and the enriched Child Tax Benefit on government revenues.

THE TAXATION OF CHILD SUPPORT

Prior to the child support reform, payers of child support could deduct the payments from their income for tax purposes, while recipients of child support were required to include the payments in their income for tax purposes. In other words, under the deduction-inclusion rules for taxation of child support, support-paying parents were able to claim a tax deduction and receiving parents were required to pay tax on child support.

RATIONALE FOR CHANGING THE TAXATION OF CHILD SUPPORT

In the years leading up to the child support reform, the government became aware that some Canadians had concerns about the deduction-inclusion rules for taxation of child support. In response, the government participated in public consultations on the taxation of child support through the Family Law Committee and the Task Group on the Taxation of Child Support. The consultations revealed broad-based support for change.

Few Canadians were in favour of giving support-paying parents a tax deduction for the costs of raising their children. These costs were seen as the normal obligation of being a parent and were not considered to warrant special tax assistance. At the same time, few Canadians thought it was right to tax child support as income in the hands of the support-receiving parent.

There was widespread agreement among support-paying parents, support-receiving parents, lawyers and judges that the deduction-inclusion tax rules added complexity to the determination of child support awards.

Taking the tax implications into account required lawyers and judges to perform complex tax calculations that added to the expense of family law cases. The complex tax calculations also made it more difficult for parents to negotiate child support amounts that they both perceived as fair.

The deduction-inclusion tax rules for child support provided a tax benefit when the support-paying parent was in a higher tax bracket than the custodial parent because the tax savings from the deduction exceeded the tax paid due to inclusion. It was seen as unfair that whether or not there was a tax benefit available to a family depended solely on the income discrepancy of the two parents, and not at all on the needs of the children.

Parents also complained about the cash-flow impact of the deduction-inclusion tax rules. Under these rules, the support-receiving parent had to set aside the money needed at the end of the tax year to pay the tax liability on the amount of child support received. These parents complained that they did not know how much they needed to set aside and, in any event, found it difficult to do. In the case of payers, they could have the amount of tax withheld from their earnings adjusted to reflect their child support payments. However, some payers of child support may not have been aware of this as they complained that they were required to make high monthly payments throughout the year and had to wait until they filed their tax return to benefit from the deduction.

NEW RULES FOR TAXATION OF CHILD SUPPORT

The new tax rules for child support are based on the recommendations of the Task Group on the Taxation of Child Support and the Family Law Committee. Under the new rules, child support payments are not deductible to the payer, and are not included in the income of the recipient.

The new tax rules apply to all child support awards under written agreements or court orders made on or after May 1, 1997, regardless of whether the parents were married or in a common-law relationship. They do not apply to orders made before May 1, 1997, unless the orders are varied in one of the following ways:

(i) a court order or agreement made on or after May 1, 1997 changes the amount of child support payable under the old agreement or court order;

(ii) the agreement or court order specifically provides that the no-deduction/no-inclusion tax rules apply to payments made after a specified date (which cannot be earlier than May 1, 1997); or,

(iii) the payer and the recipient both sign and file a form with the Canada Customs and Revenue Agency (CCRA) stating that the no-deduction/no-inclusion tax rules apply to payments made after a specified date (which cannot be earlier than May 1, 1997).

IMPACT OF THE NEW TAX RULES

When the child support package was announced in the 1996 Budget, the government estimated revenue gains from the new tax rules of about $15 million in the first year, $65 million in the second year, and $120 million in the third year. The estimated revenue impact was due to the loss of the income-splitting tax benefit under the deduction-inclusion tax rules.

The government committed to reinvesting the anticipated revenue gains on measures to benefit children. Specifically, the anticipated gains were to fund the implementation costs of the Federal Child Support Guidelines and new enforcement measures, and contribute to a significant enrichment of child benefits, which are described below.

ENRICHED CHILD BENEFITS

In the 1996 Budget, it was announced that the benefits under the Working Income Supplement (WIS), which was part of the Child Tax Benefit, would be doubled. The WIS provided a maximum of $500 in benefits to low-income working families. This maximum benefit was to increase to $750 in 1997 and to $1000 in 1998, at a cost of $250 million annually when fully phased in.

However, with the 1997 budget, the federal government began restructuring and further enriching child benefits. The new Canada Child Tax Benefit (CCTB), introduced in 1997, has two components: a base benefit for low- and middle-income families and the National Child Benefit (NCB) supplement for low-income families. The WIS was replaced by the NCB supplement. In the 1997, 1998 and 1999 Budgets, the federal government announced major enrichments in the CCTB totalling $2 billion per year. Further enrichments were announced as part of the Five-Year Tax Reduction Plan in the 2000 Budget and the 2000 Economic Statement and Budget Update totalling $2.6 billion per year. The CCTB has been enriched every year since the introduction of the new child support regime and the yearly maximum benefit for the first child has grown from $1,625 in July 1997 to $2,444 in July 2002, and will rise to over $2,500 by 2004. The enrichment of the CCTB since 1997 has far outweighed the projected revenue gains from switching to the no-deduction/no-inclusion tax treatment of child support.

CONCLUSION

The federal government responded to the concerns expressed by Canadians about the deduction-inclusion tax treatment of child support by implementing new tax rules that address those concerns. The government has also more than fulfilled its commitment to invest the anticipated revenue gains in measures for children from switching to the new tax rules for child support, by significantly enriching the CCTB.

APPENDIX 3: SURVEY OF CHILD SUPPORT AWARDS UNDER THE *DIVORCE ACT*

The federal Department of Justice developed the Survey of Child Support Awards in close collaboration with the members of the Federal-Provincial-Territorial Research Subcommittee. The survey monitors the way the Guidelines are being put into effect and whether they are achieving their objectives. For the pilot phase of the survey, data were collected from fall 1997 to September 1998.

Following some minor methodological adjustments, the revised survey was put in place on October 1, 1998, and will continue until April 2002. All jurisdictions except Quebec[70] and Nunavut participated in the survey and provide data from at least one court.

The provincial representatives on the Research Subcommittee selected these court sites for the study:

- St. John's, Newfoundland;
- Charlottetown and Summerside, Prince Edward Island;
- Halifax, New Glasgow, Sydney, Truro, and Yarmouth, Nova Scotia;
- Fredericton, New Brunswick;
- Ottawa, Toronto, and London, Ontario;
- Winnipeg, Manitoba;
- Saskatoon and Regina, Saskatchewan;
- Edmonton and Calgary, Alberta;
- Victoria, British Columbia;
- Yellowknife, Northwest Territories; and
- Whitehorse, Yukon.

The survey is designed to record, at each participating court, all decisions under the Divorce Act[71] involving children. As of February 2001, the sample consisted of more than 23,000 cases. Data sources include all interim child support orders in divorce files; final divorce judgments that specifically incorporate separation agreements; minutes of settlement or previous court orders; final divorce judgments that are silent on child support even though children are involved; orders varying divorce judgments; and final divorce judgments that contain corollary relief orders.

Please see the following reports for additional information on the cases in the database, and for more details on case processing in each participating court:

Bertrand, Lorne D., Joseph P. Hornick, Joanne J. Paetsch, and Nicholas M.C. Bala. The Survey of Child Support Awards: Interim Analysis of Phase II Data (October 1998– March 2000). Ottawa: Department of Justice, Child Support Team, 2001 (CSR 2001-2E/2F), <http://canada.justice.gc.ca/en/ps/sup/pub/rap/phase2.html>.

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[70] As Quebec's system of determining child support awards is different from the Federal Child Support Guidelines, a separate study was designed to collect and analyze data in Quebec. See: Madame Linda Goupil *Rapport du Comité de suivi du modèle québécois de fixation des pensions alimentaires pour enfants*, Québec: Ministre de la Justice, procurement générale, ministre responsable de la Condition feminine et de l'application des lois professionnelles, Mars 2000. (See English translation at: Department of Justice, *Report of the Follow-up Committee on the Quebec Model for the Determination of Child Support Payments*, Ottawa: Department of Justice Canada, Family, Children and Youth Section, 2002 (BP33E).

[71] At some court sites data from cases proceeding under provincial legislation has also been collected. These cases have been eliminated from the analyses for this report.

Bertrand, Lorne D., Joseph P. Hornick, and Nicholas M.C. Bala. *The Survey of Child Support Awards: Preliminary Analysis of Phase II Data (October 1998–May 1999).*
Enquête sure les pensions alimentaires pour enfants : Analyse préliminaire des données de la phase 2 (octobre 1998 – mai 1999).
Ottawa: Department of Justice, Child Support Team, 2000 (CSR-2000-2E/2F).

Hornick, Joseph P., Lorne D. Bertrand, and Nicholas M.C. Bala. *The Survey of Child Support Awards: Final Analysis of Pilot Data and Recommendations for Continued Data Collection.*
Enquête sur les pensions alimentaires pour enfants: analyse finale des données de l'enquête pilote et recommandations concernant la collecte de données.
Ottawa: Department of Justice, Child Support Team, 1999 (CSR-1999-2E/2F),
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APPENDIX 4: SUPPLEMENTARY TABLES—SURVEY OF CHILD SUPPORT AWARDS

Table A: Disposition of Child Support Order by Year of Judgment

Disposition of order		Year of judgment						Total	
		1997–98[72]		1999		2000			
			%		%		%		%
Consent/uncontested	Count	9,881	86.6	10,041	88.4	7,854	93.1	20,566	89.1
Contested	Count	1,534	13.4	1,320	11.6	583	6.9	2,527	10.9
Total	Count	11,415	100	11,361	100	8,437	100	23,093	100

Source: Survey of Child Support Awards database.

Notes:
1. Where year of judgment is known.
2. For purposes of this analysis, cases from the pilot phase and phase II of the *Survey of Child Support Awards* were combined to provide a full 12 months of cases for 1997–98. Data for the pilot phase of the Survey of Child Support Awards were collected between December 1997 and October 1998. Data collection for phase II of the survey started in November 1998.

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[72] **Data from the pilot phase in November and December 1997 were combined with 1998 phase II data.**

Table B: Frequency Distribution of Issues Dealt With in the Survey of Child Support Award Cases

Combination of issues	n	%
Total cases[1]	**18,077**	**100.0**
Child support, custody, access	5,315	29.4
Child support, custody, access, spousal support	3,229	17.9
Child support only	2,364	13.1
Child support, custody	675	3.7
Child support, arrears	659	3.6
Child support, custody, access, award termination provision	605	3.3
Custody, access	509	2.8
Child support, custody, access, spousal support, award termination provision	330	1.8
Child support, custody, access, arrears	316	1.7
Child support, custody, access, review clause	302	1.7
Child support, custody, access, other issue	300	1.7
Child support, spousal support	279	1.5
Child support, access	217	1.2
Child support, custody, spousal support	214	1.2
Child support, award termination provision	208	1.2
Custody only	192	1.1
Other combination	2,363	13.1

[1] Excludes cases for which an issue was not reported for the order or judgment.

Source: Survey of Child Support Awards database, February 2001.

Table C: Most Frequent Combinations of Issues Dealt With, by Type of Order

	Total		Order/Judgment		Variation	
Combination of issues	n	%	n	%	n	%
Total cases[1]	**17,400**	**100.0**	**13,632**	**100.0**	**3,768**	**100.0**
Child support, custody, access	**5,082**	**29.2**	4,776	35.0	306	8.1
Child support, custody, access, spousal support	**3,160**	**18.2**	3,115	22.9	45	1.2
Child support	**2,228**	**12.8**	798	5.9	1,430	38.0
Child support, custody	**634**	**3.6**	498	3.7	136	3.6
Child support, custody, access, award termination provision	**585**	**3.4**	551	4.0	34	0.9
Child support, custody, access, spousal support, award termination provision	**328**	**1.9**	326	2.4	2	0.1
Child support, custody, access, review clause	**288**	**1.7**	259	1.9	29	0.8
Child support, custody, access, arrears	**300**	**1.7**	209	1.5	91	2.4
Child support, custody, access, other	**295**	**1.7**	285	2.1	10	0.3
Child support, custody, spousal support	**211**	**1.2**	203	1.5	8	0.2
Other combination	**4,289**	**24.6**	2,612	19.2	1,677	44.5

[1] Excludes cases for which an issue or the type of order were not reported.

Source: Survey of Child Support Awards database, February 2001.

There has been a small increase in the proportion of cases that result in shared physical custody arrangements (as defined by the Federal Child Support Guidelines) from 1998 to 2000.

Table D: Type of Physical Custody Arrangement by Year of Judgment*

			Year of judgment			
			1998	1999	2000	Total
Type of physical custody arrangement	Sole-mother	Count	2,579	8,955	6,355	17,889
		% within year of judgment	80.5%	80.3%	78.1%	79.5%
	Sole-father	Count	282	928	770	1,980
		% within year of judgment	8.8%	8.3%	9.5%	8.8%
	Shared	Count	151	604	541	1,296
		% within year of judgment	4.7%	5.4%	6.6%	5.8%
	Split	Count	169	577	421	1,167
		% within year of judgment	5.3%	5.2%	5.2%	5.2%
	Other	Count	22	84	53	159
		% within year of judgment	0.7%	0.8%	0.7%	0.7%
Total		Count	3,203	11,148	8,140	22,491
		% within year of judgment	100.0%	100.0%	100.0%	100.0%

*Note: This means the type of custody for purposes of determining child support amounts. This table does not reflect the allocation of legal decisionmaking authority.

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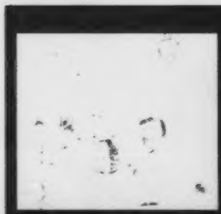

CHILDREN COME FIRST

A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines

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Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the *Federal Child Support Guidelines*

Volume 2

TABLE OF CONTENTS

1. **FEDERAL-PROVINCIAL-TERRITORIAL COMMITTEES** 3
   - Federal-Provincial-Territorial Family Law Committee 3
   - Federal-Provincial-Territorial Task Force on the Implementation of Child Support Reforms 3
   - Federal-Provincial-Territorial Maintenance Enforcement Program Directors 4
   - Co-Chairs Committee 5
   - Advisory Committee for Implementation of Child Support Guidelines 5

2. **CHANGING CANADIAN FAMILIES** 7
   - Changing Family Patterns: 1963 to 1993-94 7
   - Children's Age When Parents Separate or Divorce 9
   - Relationship Between Type of Union and Risk of Separation or Divorce 10
   - Custody Arrangements under Court Orders, 1994-95 11
   - Actual Living Arrangements 12
   - Child Support Arrangements 12
   - Relationship Between Type of Child Support Arrangement and Regularity of Payment 13
   - Relationship Between Visiting Patterns and Payment of Child Support 13
   - Relationship Between Family Type and Child Poverty 13
   - Relationship Between Social Assistance and Child Support 14
   - Effect of Changing Family Situations on Children 14

3. **OVERVIEW OF PROVINCIAL AND TERRITORIAL GUIDELINES** 17
   - Guidelines Across Canada 17
   - Provinces and Territories That Have Adopted the *Federal Child Support Guidelines* Under Provincial or Territorial Laws 18
   - Provinces That Have Received a Designation 22

4. **SECTION-BY-SECTION REVIEW OF THE FEDERAL CHILD SUPPORT GUIDELINES AND THE DIVORCE ACT** 29
   - Introduction 29
   - Section-by-Section Review of the *Federal Child Support Guidelines* 29
   - Review of Sections of the *Divorce Act* That Relate to Child Support 149

5. **FEDERAL ROLE IN SUPPORT ENFORCEMENT IN CANADA** 177
   - PART 1: Department of Justice Sections Involved in Support Enforcement 177
   - PART 2 (A): Amendments to Federal Legislation 178
   - PART 2 (B): Ongoing Policy Work Related to Federal Legislation 184
   - PART 3: Federal Initiatives to Improve Compliance With Support Obligations 184
   - PART 4: Reciprocal Enforcement of Family Support Obligations 189
   - PART 5: Federal Research on Enforcement Issues 190

6. **FEDERAL FUNDING OF PROVINCIAL AND TERRITORIAL CHILD SUPPORT, SUPPORT ENFORCEMENT, AND CHILD CUSTODY AND ACCESS PROJECTS, 1997-2001** 193
   - Introduction 193
   - Family Justice Initiatives Projects 196

7. **PILOT ADMINISTRATIVE MECHANISMS TO RECALCULATE CHILD SUPPORT AND AN OVERVIEW OF EXPERIENCES OR MODELS IN OTHER JURISDICTIONS** 221
   - Pilot Administrative Mechanisms to Recalculate Child Support, 2000-01 221
   - Overview of Experiences or Models in Foreign Jurisdictions 224

8. COMMUNICATIONS AND LAW INFORMATION ACTIVITIES 227
9. LIST OF DEPARTMENT OF JUSTICE RESEARCH PUBLICATIONS 233

1. FEDERAL-PROVINCIAL-TERRITORIAL COMMITTEES

FEDERAL-PROVINCIAL-TERRITORIAL FAMILY LAW COMMITTEE

The Federal-Provincial-Territorial Family Law Committee (Family Law Committee) was instrumental in developing the *Federal Child Support Guidelines*. Established as a standing committee reporting to the deputy ministers of justice in 1981, the Committee comprises the director of family law policy in each of the jurisdictions. To ensure that the Guidelines were successfully implemented across the nation, the Family Law Committee gave this responsibility to the newly created Federal-Provincial-Territorial Task Force on the Implementation of Child Support Reforms.

FEDERAL-PROVINCIAL-TERRITORIAL TASK FORCE ON THE IMPLEMENTATION OF CHILD SUPPORT REFORMS

The federal, provincial, and territorial deputy ministers created the Federal-Provincial-Territorial Task Force on the Implementation of Child Support Reforms (FPT Task Force) in 1996 to coordinate the introduction of the C-41 reforms and the review of the *Federal Child Support Guidelines*. The Family Law Committee remained responsible for inter-governmental collaboration on substantive child support policy issues. The interdisciplinary FPT Task Force comprised representatives from the provinces and territories and the federal Department of Justice. Valuable help came from standing subcommittees and ad hoc working groups including those working on enforcement, research, reciprocal maintenance and support orders, and computer technology.

SUBCOMMITTEE ON ENFORCEMENT

This subcommittee comprises regional members who get input from the enforcement programs in their regions on all the work the subcommittee does. Established in 1996, its role is to identify, recommend, develop and implement support enforcement initiatives.

RECIPROCAL ENFORCEMENT OF SUPPORT ORDERS (REMO-RESO) WORKING GROUP

This working group came together in 1998. Members include officials from each province and territory and the Government of Canada, all of whom are responsible for or familiar with reciprocal support legislation, policy, procedures, reciprocity negotiation, and analysis within Canada and abroad. The working group discusses ways to more efficiently establish, vary, and recognize inter-jurisdictional support orders.

RESEARCH SUBCOMMITTEE

The Research Subcommittee includes at least one representative from each province and territory, a representative from Statistics Canada's Canadian Centre for Justice Statistics, and a representative from Treasury Board of Canada, Secretariat. The Subcommittee establishes short- and long-term research requirements and promotes cooperation and collaboration on research activities of mutual interest.

COMMUNICATIONS SUBCOMMITTEE

The Communications Subcommittee promotes cooperation and collaboration on communications activities of common interest. Members discuss and advise on federal, provincial, and territorial child support communications activities and products.

RULES AND FORMS SUBCOMMITTEE

The Rules and Forms Subcommittee was formed in 1997 and met once in 1998. Although the Subcommittee has been largely dormant, it made it easier to share information about rules and forms between the jurisdictions and to distribute them to all members of the Subcommittee. The FPT Task Force continues to share this information.

COMPUTER TECHNOLOGY SUBCOMMITTEE

In September 1998 the FPT Task Force established the Computer Technology Subcommittee. This group comprises representatives from jurisdictions that are using commercial software in the courts or that plan to do so. Members discuss developments in the use of software and identify enhancements needed to address particular aspects of the Guidelines.

REPORTING FRAMEWORK SUBCOMMITTEE

The Reporting Framework Subcommittee met for the first time in November 1998 "to develop a reporting framework for funded projects, which will meet the needs of both the FPT Task Force and federal government, and to recommend to the Task Force a standardized reporting framework." This subcommittee was set up to respond to two issues. The first issue was provincial perceptions of onerous and unclear requirements for funding under the Child Support Implementation and Enforcement Fund. The second issue was a federal initiative to encourage funding recipients to use performance measures in order to move to results-based reporting.

INTEGRATED SERVICES DISPUTE RESOLUTION MODELS WORKING GROUP

The Integrated Services Dispute Resolution Models Working Group (formerly known as the Section 25.1 Subcommittee) was established in 1999 to promote information sharing and to develop models for faster and cheaper methods for resolving family law issues outside court, including methods for determining child support as envisioned by section 25.1 of the *Divorce Act*.[1] By November 2000, the Working Group had achieved many of its objectives. The FPT Task Force was able to take over the ongoing work of the Working Group and the latter was suspended.

FEDERAL-PROVINCIAL-TERRITORIAL MAINTENANCE ENFORCEMENT PROGRAM DIRECTORS

Senior managers from different governments who run enforcement programs meet to discuss how their programs are run and to share and solve problems.

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[1] **A subcommittee of the FPT Task Force, the Section 25.1 Subcommittee, had discussed the key elements of a method for determining child support. The Working Group continued this work.**

CO-CHAIRS COMMITTEE

The co-chairs of the FPT Task Force, the Family Law Committee and the Maintenance Enforcement Program Directors are jointly responsible to the governments' deputy ministers for coordinating the activities of the groups. They ensure that the three committees share information broadly.

ADVISORY COMMITTEE FOR IMPLEMENTATION OF CHILD SUPPORT GUIDELINES

In 1997, to benefit from the experience and perspectives of groups independent of governments, the federal Deputy Minister of Justice established the Advisory Committee for Implementation of Child Support Guidelines. The Committee comprised judges, law professors, family law practitioners, accountants and representatives of the Canadian Bar Association, family service organizations, and legal aid personnel appointed to this committee by the Deputy Minister. The Committee advised on ways to monitor the implementation of the *Divorce Act* amendments and the Guidelines. It also recommended changes to make the *Divorce Act* work more efficiently.

2. CHANGING CANADIAN FAMILIES

Canadian families have changed dramatically over a relatively short period of time, and the pace of change continues to increase.

CHANGING FAMILY PATTERNS: 1963 TO 1993–94

The number of children born to unmarried mothers not living with a partner has remained relatively stable for many years (at about five percent of all births).[2] As detailed below, however, the number of children whose parents have separated, divorced, and found new partners—sometimes several times—has increased dramatically in the past four decades.[3]

In the 1960s, more than 90 percent of Canadian children were born to first-time married parents—that is, parents who had neither cohabited with each other before marriage nor previously lived with another partner (see Figure 1). By 1993–94, this situation had changed significantly.

- Less than 40 percent of children were born to married parents who had not lived together before marriage or before the birth of their children.
- Nearly 33 percent of children were born to married parents who had lived together before they were married, and a further 20 percent were born to parents who were living together but were not married.[4]

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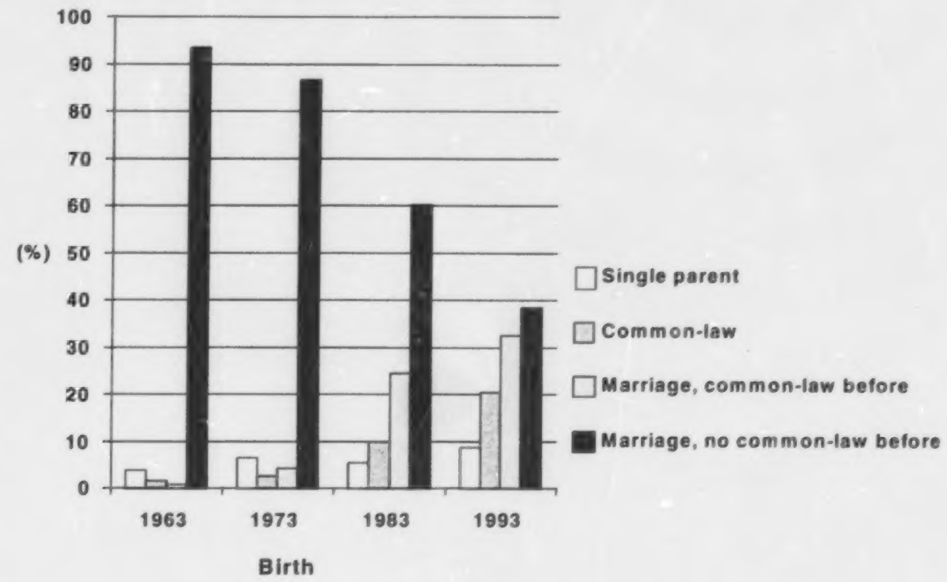
[2] **Marcil-Gratton, N., and Le Bourdais, C., *Custody, Access and Child Support: Findings from the National Longitudinal Survey of Children and Youth* (Ottawa: Department of Justice, CSR 1999-3E, 1999), p. 3.**

[3] **Le Bourdais, C., Juby, H., and Marcil-Gratton, N., *Keeping Contact with Children: Assessing the Father-Child Post-separation Relationship from the Male Perspective* (Ottawa: Department of Justice, CSR-2000-3E, 2001). See also Marcil-Gratton and Le Bourdais, 1999 (footnote 2).**

[4] **These changes were not uniform across the country. They were most marked in Quebec, where in 1993–94 only 23 percent of children were born to parents who had married without cohabiting first, and 43 percent were born to common-law couples. The province in which the situation had changed the least from the 1960s was Ontario, where only 12 percent of the children born in 1993–94 were born to common-law couples. See Marcil-Gratton and Le Bourdais, 1999 (footnote 2).**

Figure 1. Family Type at Birth for Children Born in Various Years



Sources: 1961–63 births: Family History Survey 1984; 1971–73 births: General Social Survey 1990; and 1983–84 and 1993–94 births: National Longitudinal Survey of Children and Youth, 1994–95. Chart adapted from N. Marcil-Gratton and C. Le Bourdais. *Custody, Access and Child Support: Findings from the National Longitudinal Survey of Children and Youth*. Ottawa: Department of Justice, CSR 1999-3E, 1999.

A conservative estimate for 2001 is that 20 percent of children aged 11 and younger were born into a single-parent family or had experienced their parents' separation or divorce.[5] By 2001, as well, approximately 30 percent of children aged 12 to 19 had experienced life in a single-parent family.[6] Based on Statistics Canada population estimates for 2000, these two groups amounted to almost two million children (See Table 1).[7]

Table 1: Number of Children Affected by Parental Separation

Age group of children	Number of children in 2000	Estimated rate of parental separation	Number of affected children
Aged 0–11	4,657,302	20% of population	= 931,460
Aged 12–19	3,285,200	30% of population	= 985,560
TOTAL	7,942,502		= 1,917,020

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[5] **Based on information gathered from the National Longitudinal Survey of Children and Youth (1994–95 and 1996–97) and other demographic studies.**

[6] **Personal communication with Heather Juby, Département de démographie, Université de Montréal, 2001.**

[7] **The most recent population estimates from Statistics Canada indicate that in 2000 there were nearly 8 million children (7,942,502) in Canada aged 19 years or less (Statistics Canada, *Population by Age and Sex*, CANSIM matrix 6367, 2001). Extrapolating from the National Longitudinal Survey of Children and Youth (1994–95 and 1996–97), it has been estimated that 20 percent of children aged 11 and younger, and 30 percent of children aged 12–19, will have experienced life in a single-parent family by 2001. See Le Bourdais et al., footnote 2. Also, personal communication with Heather Juby, research officer, Département de démographie, Université de Montréal, 2001.**

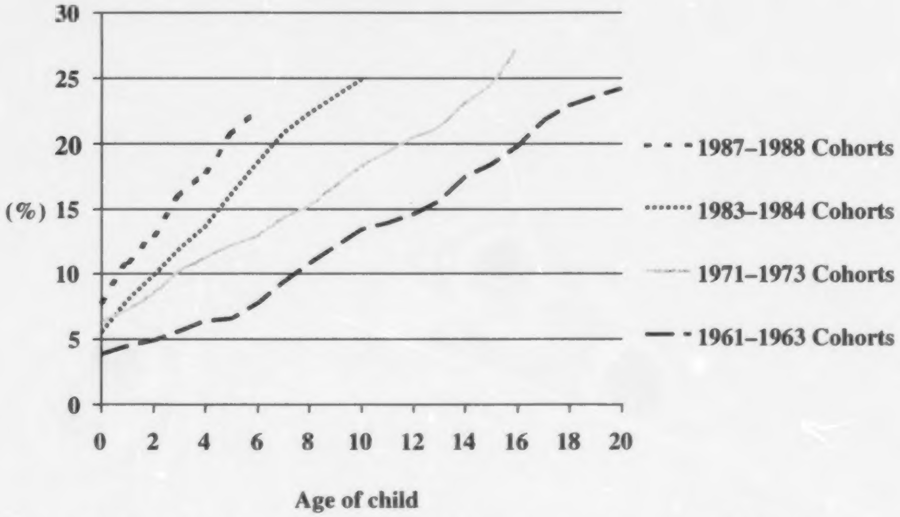
CHILDREN'S AGE WHEN PARENTS SEPARATE OR DIVORCE

Figure 2 shows that 25 percent of children born between 1961 and 1963 were either born to a single mother or had experienced their parents' separation or divorce before the age of 20, and that half of these had gone through this experience before they reached the age of 10.

Children who were born 10 years later (between 1971 and 1973) experienced their parents' separation at an even younger age. Of these children, 25 percent had already experienced life in a single-parent family by age 15, and three-quarters of this group had gone through this experience before they reached the age of 10.

These dramatic demographic changes have taken place over a relatively short period of time, and the pace of change continues to increase. Twenty-five percent of all children born in 1983–84 experienced their parents' separation by age 10, and nearly 23 percent of children born in 1987–88 experienced it by the age of six.

Figure 2. Proportion of Canadian Children Born in Various Years Who Were Born to a Single Parent or Whose Parents Separated



Source: N. Marcil-Gratton and C. Le Bourdais. *Custody, Access and Child Support: Findings from the National Longitudinal Survey of Children and Youth*. Ottawa: Department of Justice, CSR 1999-3E, 1999.

Looked at another way (Table 2), these data show the proportion of children in each age group in the National Longitudinal Survey of Children and Youth who experienced at least one family transition between birth and 1994–95.

Table 2. Proportion of Children Going Through at Least One Family Transition Between Birth and 1994–95

Age in 1994–95	0–1 year	2–3 years	4–5 years	6–7 years	8–9 years	10–11 years	Total
Percentage with at least one family transition	6.5	15.5	20.4	22.8	23.4	26.1	19.2

Source: Le Bourdais. *The Impact of Parental Transitions on Children's Family Environment and Economic Well-being: A Longitudinal Assessment. Phase 1—Preliminary Analysis. An Analysis of the National Longitudinal Survey of Children and Youth.*

Information on the same children was collected two years later, in 1996–97. Preliminary analysis of these data indicates that many children had experienced at least one family transition in the intervening two years. Overall, eight percent of children experienced at least one change in their circumstances in those two years, but among those whose parents were already apart in 1994–95 the percentage was much higher. Almost two-thirds of the latter group had experienced some further change in their family environment, in comparison to only 15 percent of children whose parents were together when the children were born.[8]

RELATIONSHIP BETWEEN TYPE OF UNION AND RISK OF SEPARATION OR DIVORCE

Parents' decision to live together rather than to marry has far-reaching consequences for the survival of the family unit.[9] As shown in Figure 3, more than 60 percent of children born into common-law families will, before they reach the age of 10, experience their parents' separation. Risk of separation after the birth of children is about equal for common-law couples who married before and those who married after the birth of their children, at between 25 and 30 percent. Children whose parents married without living together first face the lowest risk of their parents separating before age 10 (less than 15 percent).

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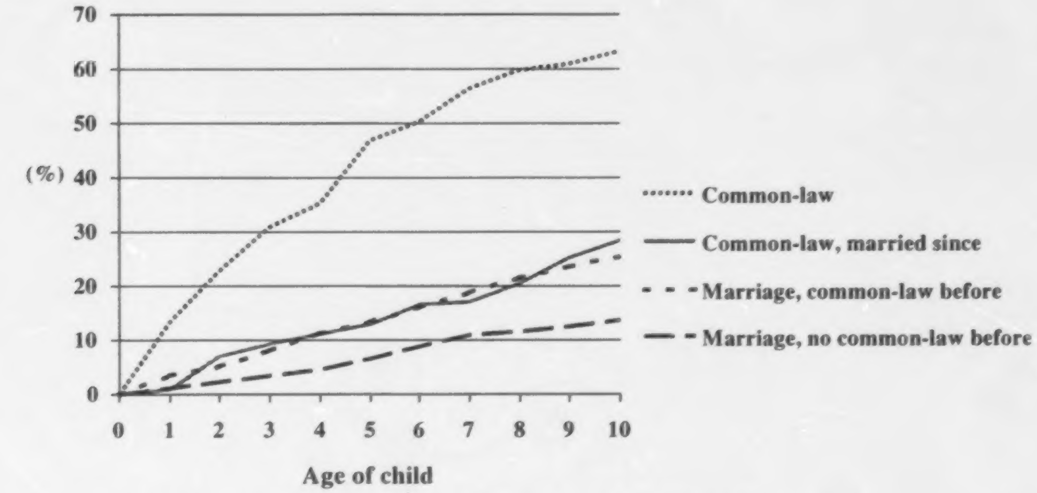
[8] **See Le Bourdais et al., *Keeping Contact with Children*, p. 5.**

[9] **According to Marcil-Gratton and Le Bourdais, *Custody, Access and Child Support*.**

Figure 3. Canadian Children Born in 1983–84 into a Two-Parent Family Whose Parents Have Separated



Source: N. Marcil-Gratton and C. Le Bourdais. *Custody, Access and Child Support: Findings from the National Longitudinal Survey of Children and Youth.* Ottawa: Department of Justice, CSR 1999-3E, 1999.

CUSTODY ARRANGEMENTS UNDER COURT ORDERS, 1994–95

After separation, mothers receive custody of the children in the overwhelming proportion of cases. The National Longitudinal Survey of Children and Youth data on custody, access, and child support arrangements indicate that in cases where a court order existed, close to 80 percent of children younger than 12 were placed in their mother's custody. Almost 7 percent were placed in their father's custody, and 13 percent were in a shared custody arrangement.[10] Unfortunately the survey does not contain any information on the number of parents who may have unsuccessfully applied for different types of custody arrangements.

These proportions change according to the age of the children at the time of separation. Older children are more likely to be placed in their father's care or in shared physical custody arrangements. Among children aged 6 to 11, one child in four was entrusted to his or her father's care, either exclusively (8 percent) or jointly with the mother (16 percent). Among children aged 5 and younger, only 18 percent were in the sole custody of their father (6 percent) or in shared custody (12 percent). Finally, children from broken common-law unions were most likely to remain in the custody of their mothers (84 percent).[11]

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[10] See Marcil-Gratton and Le Bourdais, 1999 (footnote 2) p. 19. These proportions are very similar to those found in the Survey of Child Support Awards under the *Divorce Act*. Data collected from divorce orders between October 1998 and January 2001 show that mothers are given sole custody of the children in 79.6 percent of cases, fathers are given sole custody in 8.8 percent, shared custody is awarded in 5.8 percent, and split custody is awarded in 5.2 percent (Survey of Child Support Awards database, 2001).

[11] Marcil-Gratton and Le Bourdais, 1999 (footnote 2) p. 19.

ACTUAL LIVING ARRANGEMENTS

Regardless of the custody arrangements that parents reported, data from the National Longitudinal Survey of Children and Youth show that the overwhelming majority of children (81 percent) live only with their mother at the time of separation.[12] Even where there is a court order for shared custody (in about 13 percent of cases), children are still more likely (76 percent) to live with their mothers, while 15 percent lived with their fathers. In only 9 percent of cases is the living arrangement "equally shared" between the parents.[13]

CHILD SUPPORT ARRANGEMENTS

The National Longitudinal Survey of Children and Youth also provides information on the child support arrangements parents made when they separated. The most significant finding is that there are no child support agreements for almost one-third of Canadian children whose parents have separated.

Table 4. Type of Support Agreement According to Type of Broken Union, 1994–95

Type of support agreement	Type of broken union (percentage)			
	Marriage divorce %	Marriage separation %	Common-law separation %	All Unions %
Court order	48.7	15.6	20.3	27.8
Court order in progress	8.3	8.3	8.2	8.3
Private agreement	25.9	39.4	29.2	31.5
No agreement	17.2	36.7	42.2	32.5
Total*	100	100	100	100
N**	1047	1077	1184	3308

*Due to rounding, columns may not add up to 100%

**N = Weighted data brought back to the original sample size.

Source: Marcil-Gratton and Le Bourdais, 1999 (footnote 2)

Children whose parents had divorced at the time of the survey were more likely to be covered by some type of child support agreement than were children whose parents had separated but not divorced. When the parents were divorced, parents said there was a court order in place, or in progress, in 57 percent of cases, and there was no agreement in only 17 percent of cases. Children from common-law unions were least likely to be covered by a child support agreement, followed closely by children whose parents who have not yet obtained a divorce.[14]

Some children will experience several changes in their family situation before reaching the age of majority. For these children the arrangements for their care and financial support may change significantly over time, whether formally through the courts or by means of an informal agreement.

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[12] **This proportion increases to 87 percent when there is no court order regarding custody of the children.**

[13] **Marcil-Gratton and Le Bourdais, 1999 (footnote 2) p. 21.**

[14] **Marcil-Gratton and Le Bourdais, 1999 (footnote 2) pp. 28–33.**

RELATIONSHIP BETWEEN TYPE OF CHILD SUPPORT ARRANGEMENT AND REGULARITY OF PAYMENT

According to respondents to the National Longitudinal Survey of Children and Youth, children covered by a private agreement between the parents are more likely to receive regular support payments than are children whose parents have arrangements under a court order. Two-thirds of children under private agreements benefited from regular support payments compared to 43 percent of children whose parents had a court-ordered agreement. Moreover, cases in which there have been no payments in the last six months are much more common among parents who have a court order than among those with a private agreement (30 percent versus 14 percent).

This trend holds true regardless of the type of broken union. For children whose parents were married and made a private agreement regarding child support, the data show a high proportion (73 percent) of regular payers; in only 8 percent of cases, payments had not been made for the last six months. In the case of broken common-law unions, the proportion of cases in which there had not been a payment in the last six months is much higher, regardless of whether there was a private agreement between the spouses (24 percent) or whether a court order was in place (45 percent).[15]

RELATIONSHIP BETWEEN VISITING PATTERNS AND PAYMENT OF CHILD SUPPORT

Marcil-Gratton and LeBourdais report that there is a close association between regularity of payments and frequency of visits. Among children living with their mother, and for whom child support payments were regular and on time, close to half (48 percent) visited their father every week, while only 7 percent never saw him. In comparison, fathers who did not regularly provide for their children financially had fewer contacts with their children. Only 15 percent of children whose fathers had not provided child support payments in the last six months saw their father weekly; 28 percent never saw him.

The regularity of payments appears strongly related[16] to the likelihood of fathers maintaining frequent contact with their children. The impact of this relationship remains important even after taking into account the type of custody and child support arrangements, the type of union, the level of tension between parents, and the time elapsed since separation.[17]

RELATIONSHIP BETWEEN FAMILY TYPE AND CHILD POVERTY

According to the recent Statistics Canada report *Women in Canada, 2000,* lone-parent families headed by women have the highest incidence of low income. Based on 1997 data, 56 percent of these families fell below the low-income cut-offs. The situation has remained virtually unchanged since 1980, when the rate was 57 percent.[18]

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[15] **Marcil-Gratton and Le Bourdais, 1999 (footnote 2) pp. 28–33.**

[16] **In Marcil-Gratton and Le Bourdais, 1999 (footnote 2) the authors refer to a statistical, correlational relationship that does not imply a causal relationship. These data do not show whether fathers who regularly visit their children are also more likely to pay child support in the first place, or whether fathers are more likely to pay when they get regular visits.**

[17] **Marcil-Gratton and Le Bourdais, 1999 (footnote 2) pp. 28–33.**

[18] **Statistics Canada, *Women in Canada 2000: A gender-based statistical report* (Ottawa: Statistics Canada, Catalogue No. 89-503-XPE, 2000), p. 139. See also Galarneau, Dianne and Sturrock, Jim, *Family Income after Separation* (Ottawa: Statistics Canada, Catalogue No. 13-588-MPB, No. 5, 1997).**

Statistics Canada's low-income cut-offs are used to classify families and unattached individuals into "low income" and "other" groups. Families or individuals are classified as "low income" if they spend, on average, at least 20 percentage points more of their pre-tax income than the Canadian average on food, shelter, and clothing. Using 1992 as the base year, families and individuals with incomes below the low-income cut-offs usually spend more than 54.7 percent of their income on these items and are considered to be in straitened circumstances. The number of people in the family and the size of the urban or rural area where the family lives are also taken into consideration.

Source: *Women in Canada 2000*. Ottawa: Statistics Canada, Catalogue No. 89-503-XPE, 2000, p. 140.

Lone-parent families headed by women also account for a disproportionate share of all children living in low-income situations. Although only 13.4 percent of all children aged 18 and younger who were living at home in 1997 belonged to lone-parent families headed by women, these families accounted for over 40 percent of all children in the low-income category.[19]

RELATIONSHIP BETWEEN SOCIAL ASSISTANCE AND CHILD SUPPORT

To better understand how getting child support payments affects low-income recipients, the Department of Justice reviewed the way child support influences the amounts of income-tested benefits such as social assistance, health services, housing subsidies, child care subsidies, access to legal aid, and government cash transfers. The Department did this in each jurisdiction.[20]

Generally, social assistance ministries treat child support received as income, and deduct the full amount from the benefits delivered by the provincial or territorial government. Saskatchewan, British Columbia, and Yukon exempt the first $100, as does Quebec if the child is under the age of five.

Child support is considered income when calculating the parent's co-payment for health services, housing subsidies, child care subsidies and access to legal aid for civil purposes. The benefits that provinces and territories provide vary greatly.

Government cash transfers, the most notable being the National Child Benefit, generally use the family's net income to calculate the amount delivered by federal, provincial, and territorial governments. Non-taxable child support is not considered in the family's net income.

EFFECT OF CHANGING FAMILY SITUATIONS ON CHILDREN

Studies on the effects of separation and divorce on children have found that while most children come through the changes to their family fairly well, some are harmed by the experience, even well into adulthood.

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[19] ***Women in Canada 2000*, p. 139 (see footnote 18).**

[20] **Christopher Assié, *Low-Income Lone Parents and Child Support in Canada* (Ottawa: Department of Justice, Family, Children and Youth Section, BP31E, 2001). See also Richard Kerr and Associates, *Social Assistance and Child Support: A Pilot Study*. (Ottawa: Department of Justice, Child Support Team, 1999, BP07E).**

Of all the things that can affect children, such as troubled relationships with their parents and economic disadvantage, parental conflict—before, during and after separation and divorce—has the most noticeable impact.[21] Children who grow up surrounded by conflict between their parents are often poor achievers at school and have behavioural and psychological problems and reduced social skills.[22]

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[21] Silvia Bernardini and Jennifer Jenkins, *An Overview of Risks and Protectors for Children's Outcomes: Children of Separation and Divorce* (Ottawa: Department of Justice, Family, Children and Youth Section, 2001-FCY-13E, forthcoming).

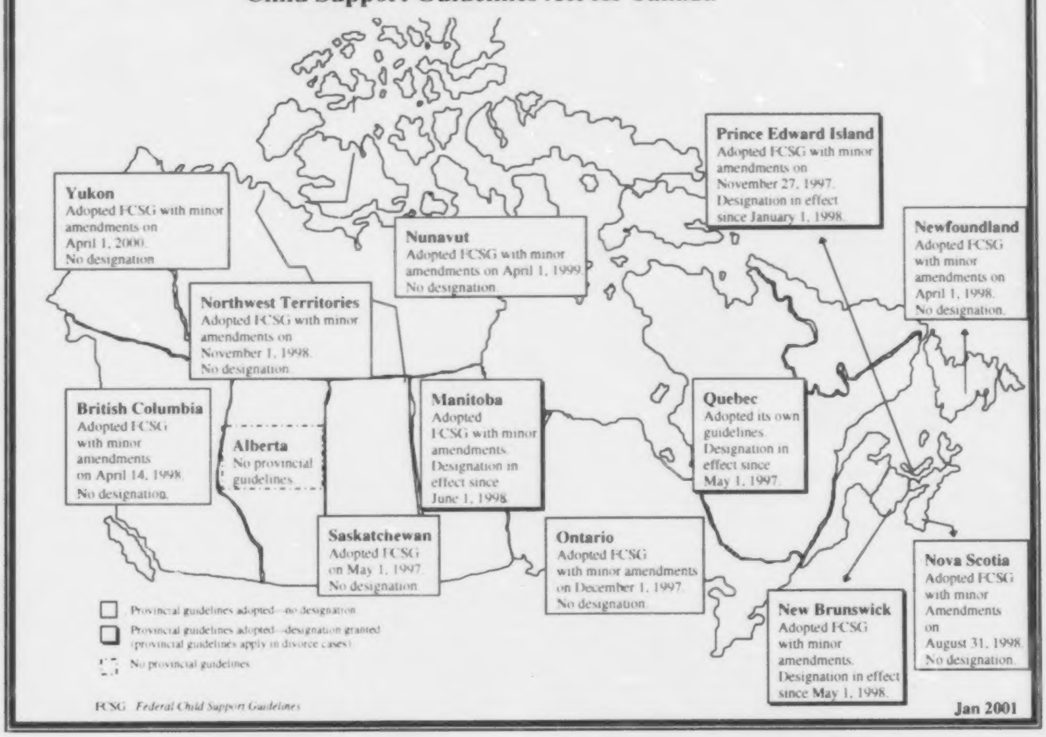
[22] Research and Statistics Division, *The Effects of Divorce on Children: Annotated Bibliography* (Ottawa: Department of Justice, Research and Statistics Division, WD1998-3e, 1997); Ron Stewart, *The Early Identification and Streaming of Cases of High Conflict Separation and Divorce: A Review* (Ottawa: Department of Justice, Family, Children and Youth Section, 2001-FCY-7E, 2001); Bernardini and Jenkins, *An Overview of Risks and Protectors for Children's Outcomes.*

3. OVERVIEW OF PROVINCIAL AND TERRITORIAL GUIDELINES

GUIDELINES ACROSS CANADA

Since 1997, all the provinces and territories except Alberta have adopted child support guidelines in their laws. In Alberta, the *Federal Child Support Guidelines* have been implemented in practice for cases before the courts but have not been adopted in provincial law.[23] The provincial and territorial child support guidelines apply to separating parents who were never married, and to parents who are married and have separated but are not getting divorced.

Child Support Guidelines Across Canada



Yukon
Adopted FCSG with minor amendments on April 1, 2000.
No designation

Nunavut
Adopted FCSG with minor amendments on April 1, 1999.
No designation.

Northwest Territories
Adopted FCSG with minor amendments on November 1, 1998.
No designation.

British Columbia
Adopted FCSG with minor amendments on April 14, 1998.
No designation.

Alberta
No provincial guidelines.

Saskatchewan
Adopted FCSG on May 1, 1997.
No designation.

Manitoba
Adopted FCSG with minor amendments.
Designation in effect since June 1, 1998.

Ontario
Adopted FCSG with minor amendments on December 1, 1997.
No designation.

Quebec
Adopted its own guidelines.
Designation in effect since May 1, 1997.

Prince Edward Island
Adopted FCSG with minor amendments on November 27, 1997.
Designation in effect since January 1, 1998.

Newfoundland
Adopted FCSG with minor amendments on April 1, 1998.
No designation.

New Brunswick
Adopted FCSG with minor amendments.
Designation in effect since May 1, 1998.

Nova Scotia
Adopted FCSG with minor Amendments on August 31, 1998.
No designation.

☐ Provincial guidelines adopted—no designation
☐ Provincial guidelines adopted—designation granted (provincial guidelines apply in divorce cases)
⬚ No provincial guidelines

FCSG *Federal Child Support Guidelines*

Jan 2001

The provinces and territories that have guidelines have adopted the *Federal Child Support Guidelines* with few or no changes. The one exception is Quebec, which has adopted different guidelines. This section of the report provides an overview of all provincial and territorial guidelines, and compares Quebec's guidelines to the federal ones. The Quebec Department of Justice has a report of its own, which has more information on the Quebec guidelines.[24]

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[23] **A practice directive instructs provincial courts to use the *Federal Child Support Guidelines*. The Alberta legislature passed enabling legislation, in the form of amendments to its *Domestic Relations Act*, but it has yet to be proclaimed.**

[24] **Government of Quebec, *Rapport du Comité de suivi du modèle québécois de fixation des pensions alimentaires pour enfants* Ministère de la Justice, 2000.**

Four provinces—Quebec, Prince Edward Island, New Brunswick, and Manitoba—received a designation for their guidelines.[25] This means that the provincial child support guidelines have provisions that differ from the *Federal Child Support Guidelines*. The designation allows those provisions to apply to *all* child support cases (even those that would otherwise be dealt with under the *Divorce Act*) when both parents live in the province.[26] When both parents do not live in the province, and they are getting divorced, the *Federal Child Support Guidelines* apply.

The designation provides greater consistency between child support amounts ordered under provincial or territorial legislation and those ordered under the *Divorce Act*.

If a jurisdiction is not designated, the *Federal Child Support Guidelines* will apply to child support cases under the *Divorce Act* and the jurisdiction's own guidelines will apply to matters under provincial or territorial law.

PROVINCES AND TERRITORIES THAT HAVE ADOPTED THE *FEDERAL CHILD SUPPORT GUIDELINES* UNDER PROVINCIAL OR TERRITORIAL LAWS

SASKATCHEWAN

Saskatchewan amended its provincial legislation, in *An Act to Amend The Family Maintenance Act*, as well as the accompanying regulations, to bring its legislation into harmony with the Guidelines, effective May 1, 1997.

ONTARIO

On December 1, 1997, Ontario adopted provincial guidelines that mirror the federal ones without substantive changes, under Bill 128, *An Act to Amend the Family Law Act*, S.O. 1997, c. 20. Ontario law requires a court that makes or varies a child support order to do so in accordance with child support guidelines prescribed by regulations under the *Family Law Act*.

These changes parallel the federal reforms to the *Divorce Act* and the *Federal Child Support Guidelines*, with modifications necessary to reflect the operational and policy framework of the provincial *Family Law Act*. For example, the provincial guidelines use the term "parent" instead of "spouse," as the legislation will also apply to children of unmarried parents, who are not covered by the *Divorce Act* or the *Federal Child Support Guidelines*.

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[25] **Prince Edward Island was designated on January 1, 1998. New Brunswick was designated on May 1, 1998. Manitoba was designated on June 1, 1998. Quebec was designated on May 1, 1997.**

[26] **Under subsection 2(5) of the *Divorce Act*, when a province has adopted different guidelines or has adopted the federal guidelines with amendments, the province may ask that the Governor in Council designate it for the purposes of the definition of "applicable guidelines" in subsection 2(1) "if the laws of the province establish comprehensive guidelines for the determination of child support that deal with the matters referred to in s. 26.1." "Applicable guidelines" is defined in subsection 2(1) to mean: (a) where both spouses or former spouses are ordinarily resident in the same province at the time an application for a child support order or a variation order in respect of a child support order is made, or the amount of a child support order is to be recalculated pursuant to section 25.1, and that province has been designated by an order made under subsection (5), the laws of the province specified in the order, and (b) in any other case, the *Federal Child Support Guidelines*.**

BRITISH COLUMBIA

British Columbia also elected to adopt the federal guidelines with minor alterations to harmonize the legislation with the provisions of the *Family Relations Act*. This means that the Guidelines are used to calculate support for children, not only of divorcing couples, but also of spouses who are separated, unmarried, or of the same sex.

The provincial legislation was amended under the *Family Relations Amendment Act, 1997*, S.B.C. 1997, c. 20, which came into force on April 14, 1998. The *British Columbia Child Support Guideline Regulation* specifies in paragraph 1(4)(b) that a parent served with an application for child support in the provincial court must comply either with the 30-day filing requirement found in subsection 21(2) of the federal guidelines or with a time limit designated by provincial court rules.

NEWFOUNDLAND AND LABRADOR

This province's guideline regulations, called the *Child Support Guideline Regulations*, Nfld. Reg. 40/98, were enacted under the *Family Law Act*. These regulations came into force on April 1, 1998, and mirror the federal system, with a few modifications. First, a person who has been served with an application for a child support order must file income information documentation within 10 days of being served, if he or she lives in the province. This period is extended to 30 days if the respondent resides in another province or in the United States, and to 60 days for those living elsewhere. This contrasts somewhat with the federal Guidelines, which allow any respondent living in Canada or the U.S. (including the same province) 30 days to file, and 60 days if the respondent resides elsewhere.

The Newfoundland and Labrador legislation ensures that a child support order has priority over spousal support variation applications. In addition, the words "orthotic and other similar devices" have been added to section 7, which deals with special or extraordinary expenses.

The most significant departure from the federal scheme requires both spouses to file financial information, even if the support recipient's income is not needed to calculate the amount of the support payable.

NOVA SCOTIA

Nova Scotia has enacted the *Nova Scotia Child Maintenance Guidelines*, as regulations under the *Family Maintenance Act*, and these became effective on August 31, 1998. Schedules I, II, and III to the *Federal Child Support Guidelines* were adopted. In most respects, the Nova Scotia guidelines reflect the federal model, with minor variations to account for provincial legislation and Rules of Court. The basic rules for calculating child support under the Nova Scotia guidelines are the same, as are the table amounts and tests for calculating special expenses and undue hardship.

The Nova Scotia guidelines contain substantially the same provisions as the federal Guidelines with respect to children at the age of majority or over, incomes over $150,000, persons in the place of a parent, medical and dental insurance, and split and shared custody. Wording changes appear throughout to ensure that the provincial guidelines accord with the requirements of the *Family Maintenance Act*; for example, reference is made to "maintenance" in place of "support"; "parent" replaces "spouse"; and the definition of "child" in paragraph 2(1)(b) means a dependent child as defined by the *Family Maintenance Act*.

The Nova Scotia guidelines do not refer to recalculations of child support orders by a provincial child support service, as this type of service is not yet in place in the province. Under paragraph 2(4)(c), the provincial guidelines apply to written child maintenance agreements that are being registered.

The wording of subsection 7(1) and paragraph 10(2)(a) has changed because not all parents to whom the provincial guidelines apply will have cohabited.

The provincial guidelines also contain enhanced filing requirements. The new paragraph 21(1)(h) captures income information from sources such as employment insurance, social assistance, pension, workers' compensation, disability benefits, and similar sources. As well, the province has modified the federal guidelines' time frames for filing income information, doing so in subsections 21(2), (3), and (4). These modifications ensure their consistency with provincial civil procedure rules.

Finally, in sections 22 and 24 and subsection 25(7), the province has altered slightly the remedies for failure to comply. These remedies now include the additional provisions contained in the *Family Maintenance Act*, such as the ability of a court or a court officer to require production of income information under section 29 of the Act. The contempt provisions in paragraphs 25(7)(a) and (b) have also been reworded to reflect the context of the Family Court.

NORTHWEST TERRITORIES

The guidelines that the Northwest Territories adopted on November 1, 1998, under the *Children's Law Act*, S.N.W.T. 1997, c. 14, are essentially the same as the federal Guidelines. Under territorial law, a court making or varying a child support order must now apply the *Federal Child Support Guidelines*.

The territorial legislation differs from the federal Guidelines in a few minor respects. For example, all references to the term "spouse" have been replaced with either "parent" or "person," as applicable, and the definitions of "child" and "parent" are found in the Act, not in the territorial guidelines.

The Northwest Territories has also addressed the issue of multiple payers, in cases where the applicant is not a parent of the child for whom support is sought. Section 5 of the Act provides that the territorial guidelines be used to determine the amount of child support payable by each parent. For example, if a relative has custody of the child and is seeking support from the mother and father, the support from each parent is based on the Guidelines.

Sections 11 and 12 of the federal Guidelines, which deal respectively with the form of child support payments and the power of the court to order security of the payments, are not included in the territorial guidelines because similar provisions exist in the *Children's Law Act*.

Subsection 21(7) of the territorial guidelines refers to situations where the Minister responsible for the *Social Assistance Act* is a party to an application for a child support order. In those cases, section 21 (which deals with the obligation to provide income information) does not apply to the Minister, but to the parent who has received, is receiving, or will receive social assistance. Section 26 deals with the continuing obligation to provide income information, and subsection 26(9) defines the terms "assignee" and "payee," as they apply in section 26.

No mention is made of the recalculation of child support orders by a territorial child support service, as described in section 26 of the federal guidelines.

NUNAVUT

On April 1, 1999, the new territory of Nunavut grandfathered all Northwest Territories legislation. As such, the *Nunavut Child Support Guidelines* are identical to the Northwest Territories' guidelines.

YUKON

Yukon adopted the federal guidelines on April 1, 2000, in the *Yukon Child Support Guidelines*, which were enacted as regulations under the *Yukon Family Property and Support Act*, R.S.Y. 1986, c. 63, as amended by *Statutes of the Yukon 1998*, c. 8.

There are few substantive changes from the federal guidelines, although there are some differences in the wording of certain sections. For example, the term "parent" is used throughout the legislation in place of "spouse", which is found in the federal guidelines.

More significantly, the Yukon definition of "child" specifically includes a child who is treated by a parent as part of the family, except in foster care situations. The federal guidelines define a child more narrowly as a child of the marriage; that is, a child of two spouses or former spouses.

Also, while the Yukon definition of "table" mostly incorporates the federal definition, it does include the option provided for in subsection 3(3) of the federal guidelines. This option allows the court to apply the guidelines for a given province (or territory, in this case), where it is satisfied that the paying parent will reside in that jurisdiction in the near future.

The Yukon guidelines omit provisions dealing with the *Income Tax Act* (subsection 2(2) of the federal guidelines), application of the guidelines (subsection 2(4) of the federal guidelines), recalculations (subsection 2(5) of the federal guidelines), form of payment (section 11 of the federal guidelines), and security (section 12 of the federal guidelines).

Unlike subsection 7(1) of the federal guidelines, the Yukon guidelines do not specify that only parents of the child may have requests for special or extraordinary expenses. In Yukon, third parties may also apply for them. In Yukon, subsection 7(1) also differs from its federal counterpart in that Yukon courts may, but are not obliged to, consider pre- or post-separation spending patterns of the parents for their children. This consideration is mandatory under the federal scheme.

Yukon also treats undue hardship differently. In Yukon, third parties as well as spouses may apply for undue hardship. In addition, under paragraph 10(2)(a), courts may consider unusually high debts, even if they were incurred after separation. Subparagraph 10(2)(d)(i) stipulates that undue hardship may occur when a parent has a legal duty to support any child, not just a child of the marriage, as indicated in the federal guidelines.

Finally in subparagraph 10(2)(d)(ii), undue hardship may arise where a parent must support a child who is at least the age of majority but who is unable to obtain the necessaries of life, as long as "that child is not the child of the parent against whom the order for child support is sought," a measure not included in the federal guidelines. A similar provision is found in paragraph 10(2)(e), regarding the support of a child at or under the age of majority or enrolled in school full time.

The wording of paragraph 12(a) of the Yukon guidelines implies a change in circumstances is only considered if it is a change in financial circumstances affecting the support of a child. By contrast, under paragraph 14(a) of the federal guidelines any change affecting a child support order or a provision of the order is considered a change of circumstances.

The Yukon guidelines differ slightly from the federal scheme in the provisions relating to patterns of income. For example, the court must be satisfied that the amount of income in the "Total Income" box of the T1 form is the amount the paying parent is likely to receive in the current year. The Yukon guidelines (section 15) do not refer to non-recurring losses as the federal guidelines do in subsection 17(2).

Paragraph 17(1)(a) of the Yukon guidelines permits the court to impute income to a paying parent, unless that parent is unemployed or underemployed because of the child's needs. The corresponding provision in paragraph 19(1)(a) of the federal guidelines restricts imputing income to a parent who is unemployed or underemployed because of the needs of a child of the marriage or any child under the age of majority or the reasonable education or health needs of the parent. In addition, the Yukon guidelines add in paragraph 17(1)(h) that income can be imputed if dividends, capital gains, or other sources of income are exempt from tax, a feature omitted from the federal guidelines.

Under paragraphs 19(1)(h) and (i) of the Yukon guidelines, the parent applying for support must include a sworn statement of net worth, in contrast to the federal requirements.

The Yukon guidelines also vary somewhat from the federal guidelines in the way they treat the penalties for failing to comply with a court order and the way they treat the continuing obligation to provide income information.

PROVINCES THAT HAVE RECEIVED A DESIGNATION

MANITOBA

Manitoba elected to adopt the federal guidelines with modifications. Manitoba's guidelines comprise amendments to *The Family Maintenance Act*, C.C.S.M. c. F20, together with the *Child Support Guidelines Regulation*, Reg. 58/98. These guidelines came into effect on June 1, 1998. Here are the differences between the federal and Manitoba guidelines.

1. A non-custodial parent cannot apply for special expenses under the *Manitoba Child Support Guidelines Regulation*. An expense under paragraph 7(1)(b) of the federal guidelines, which refers to the portion of medical and dental insurance premiums attributable to the child, is not a special expense under the Manitoba guidelines, as this is an expense that the non-custodial parent would claim. Subsection 7(4) of the Manitoba guidelines stipulates instead that this amount be taken into account when calculating health-related expenses.

2. Under the Manitoba guidelines, special expenses can be shared only if a parent has more income than the threshold below which no amount of child support is payable.

3. Manitoba's financial disclosure and information provisions differ somewhat from those in the federal guidelines. Manitoba requires parents to provide financial information to the other parent on request, rather than requiring a court application for support. (This approach is consistent with the financial disclosure provisions in the *Family Maintenance Act*.) The Manitoba provisions enable parents to get the financial information they need to decide whether to make the support application in the first place. Manitoba's guidelines do not require parties to file as much financial disclosure material with the court as do the federal guidelines. In Manitoba, parties are permitted to file a sworn financial statement and three years of Canada Customs and Revenue Agency income and deduction computer printouts with their application. The Manitoba guidelines give parents the right to request more extensive financial disclosure material and the court can order that this material be produced.

PRINCE EDWARD ISLAND

In Prince Edward Island, the *Family Law Act* was amended by *An Act to Amend the Family Law Act (No. 2)*, S.P.E.I. 1997, c. 16, which came into effect on November 27, 1997. The province received its designation on January 1, 1998. By regulation, the province enacted child support guidelines that differ from the federal regime in two key respects.

First, the regulations include a new subsection that departs from the federal guidelines' filing requirements:

> (4.1) Despite subsections (1) to (4), if both spouses file with the court a sworn document in which they attest that they have reviewed the other spouse's income information referred to in this section and both agree on the income of that spouse, only the documents referred to in this section for the most recent taxation year need be filed unless the court orders that the documents for the three most recent taxation years be filed if the court considers that the income information does not fairly reflect the financial situation of the spouse.

The second major variation can be found in the tables themselves. Prince Edward Island has chosen to calibrate the tables so that they look and read differently from the federal tables for that province. Paying parents are required to pay more child support under the provincial tables than would be required of them under the federal legislation. For example, a paying parent with one child, earning $30,000 per annum in Prince Edward Island, whose former spouse also lives in that province, would have to pay $297 per month in child support under the provincial table. If the receiving parent lived in another province, the federal tables would apply, and the paying parent would have to pay $259 per month to support the child.

NEW BRUNSWICK

An Act to Amend the Family Services Act and the *Child Support Guidelines—Family Services Act* comprise New Brunswick's child support guidelines, which came into force on May 1, 1998. Essentially, New Brunswick's guidelines duplicate the federal regime with two notable exceptions.

First, a spouse must produce income information documents within 20 days of notice, 10 fewer days than under the federal guidelines. This departure accords with the New Brunswick Rules of Court and will speed up the production and disclosure stage of the separation and divorce process.

The second variation is that spouses may consent to file with the court only one year of income information, as opposed to the three years of income information required under the federal statute. This amendment to the federal guidelines regime means that when parties agree on income, they don't need to file as many documents.

QUEBEC

Quebec has adopted its own system for determining child support. In the case of a divorce, the Quebec rules are deemed to be the "applicable guidelines" when both parents reside in the province of Quebec. [27] They also apply to support ordered under Quebec's *Civil Code*. Quebec's rules are similar to the *Federal Child Support Guidelines* in certain respects, while significantly different in others.

The Quebec system for determining child support may be briefly described as a six-stage process.

The first stage determines the basic parental contribution, based on the terms and conditions set out in the regulation[28] and using the form and table that indicate the exact amounts for each level of disposable income. The table uses a formula that includes the parents' disposable income, the number of children involved. As in the federal guidelines, this basic parental contribution is deemed to meet the needs of the child and the ability of the parents to pay.

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[27] **Quebec was designated by order for the purposes of the definition "applicable guidelines" under the *Divorce Act* (S.O.R./97-237, (1997) 131 Can. Gaz. Part II, 1415 (Schedule 2)).**

[28] ***Regulation respecting the determination of child support payments* (*R.S.Q., c. C-25, a. 825.8; 1966, c. 68, s.2*).**

The second stage calculates the potential impact of the arrangement of the custody and access rights on the amount of the basic parental contribution. In the case of shared custody or visiting rights, and prolonged outing rights, the impact of the custody time is automatic. A visiting and prolonged outing right (representing 20 percent to 40 percent of the time) will slightly affect the basic parental contribution, whereas shared custody (40 percent or more of the time) will have a considerable impact.

The third stage is optional and takes into account certain potential additional expenses, namely child care expenses, post-secondary education expenses, and such special expenses as medical expenses, expenses for primary or secondary studies or for any other educational program, and expenses related to extracurricular activities. If the additional or special expenses are found to be eligible, they will be added, in the same proportion as that of the respective incomes, to the basic parental contribution to constitute the amount of the support payable to the receiving parent.

The fourth stage accounts for any potential "undue hardship" that, depending on the discretion of the court, may increase or reduce the support payable.

The fifth stage allows the court, at its discretion, to consider parents' assets and the resources available to the child personally to determine whether to reduce or increase the support calculated in the earlier stages.

The sixth and final stage verifies whether the result obtained exceeds 50 percent of the disposable income of the paying parent. If it exceeds this maximum, the court can adjust the amount accordingly, but it can also decline to do so if it gives reasons. Therefore, the court could decide, in exceptional cases, particularly when a paying parent has considerable assets, to order the paying parent to pay support greater than one-half of his or her disposable income.

SIMILARITIES

Fundamentally, the federal and Quebec systems for determining child support have the same motives, guiding principles, and objectives. In fact, both the Quebec and federal governments have reformed their systems because of the unpredictability in support orders, the differences in the amounts ordered, and the inadequacy of child support. Both governments wanted to base child support on two principles: the joint financial responsibility of the parents and the sharing of responsibility in proportion to the resources available. Both systems promote negotiated settlements of disputes and both give priority to child support over support that one spouse might owe the other or over any other debt.

The federal and Quebec rules reflect the search for balance between, on the one hand, having predictable and uniform orders and, on the other hand, having enough flexibility in the system to deal with special cases. Both systems reach this balance in several ways.

(1) Both systems start with a concept of disposable income that makes it possible in the vast majority of cases to determine a contribution amount using the pre-established tables (depending on the number of children). This concept acknowledges that the parents must have a minimum income available to them.
(2) Both systems make it possible to "increase" this amount later to include certain special expenses.
(3) Both systems authorize the court to depart from the formula when a party experiences undue hardship.
(4) Both systems allow the court to exercise discretion and even to completely depart from the guidelines. In these cases, the court can go back to the classic test for assessing the means and needs of the parties.

Like the Quebec guidelines, the federal guidelines provide a mandatory method of determining child support. But both sets of rules do permit exceptions in specific circumstances. Both sets of rules have similar provisions that allow judicial discretion in these situations:

(1) when children have reached the age of majority,
(2) when there are additional expenses (which are defined restrictively),

(3) when there is undue hardship (such as indebtedness for family reasons, or a high cost to exercise the right of access to the children being supported, or the burden of other support obligations), and
(4) when there are high incomes.

DIFFERENCES

There are several differences between the two systems, some of which are significant. They are essentially related to the way in which parents' incomes are assessed, the impact of child custody time, the test of undue hardship, the definition of some additional expenses, and the indexation of child support amounts.

INCOME TAKEN INTO ACCOUNT

Both the Quebec and the federal systems are based on the principle that children must be able to benefit from both of their parents' incomes; this principle is stipulated under subsection 26.1(2) of the *Divorce Act*. However, the most significant difference between the systems is that the tables in the *Federal Child Support Guidelines* require the paying parent's income only. The federal guidelines assume that the receiving parent has custody and spends a proportionate part of his or her income on the child.

However, the Quebec system, contrary to the federal guidelines, expressly takes into account the income of both parents. It applies proportional arithmetic distribution, so that income generated by the receiving parent will affect support payments, sometimes significantly. Under the federal guidelines, this income has no impact on the basic amount, set by the tables.

While this difference is significant, it is not as dramatic as it first appears. For example, under the federal guidelines, the principle (of considering the paying parent's income alone) only applies to amounts specified in the tables. However, when it comes to special or extraordinary costs, both of the parents' incomes are considered. Also, the income of the receiving parent must be considered in cases of undue hardship or shared custody, when there is income above $150,000, and when the child has reached the age of majority.

Furthermore, although Quebec has always required that the incomes of both parents be taken into account, in many cases the income of the custodial parent is deemed insufficient to be considered. Indeed, in half the cases covered by the *Report of the Follow-Up Committee on the Quebec Model for the Determination of Child Support Payments*[29] (also known as the *Follow-Up Committee Report*), a sole parent assumed the full amount of support payments for the child because the other parent did not have any "disposable" income. In other words, for socio-economic reasons, only the paying parent's income is considered in many cases.

The Quebec system also differs in that it allows the courts to consider, at their discretion, the income and assets of minor children themselves in determining parental child support,[30] something not allowed under the federal guidelines.[31]

[29] Government of Quebec, *supra* note 24. This report, which was tabled in Quebec's National Assembly on May 3, 2000, is a progress report on the application of the new determination rules in the first three years. Its assessment is generally positive (noting, in particular, that files are settled more quickly and that the number of agreements is increasing). The report makes some recommendations for improving the system.

[30] Art. 587.2 *in fine* C.C.Q.

[31] To this effect, see *Glen* v. *Glen* (1997), 34 R.F.L. (4th) 13 (B.C.S.C.); *St. Croix* v. *Maxwell* (1999), 3 R.F.L. (5th) 161 (Ont. Sup. Ct. Just.).

The two systems define income differently when support payments are calculated. For instance, different sources of income may be considered, such as capital gains[32] or student loans and bursaries.[33] Beyond these distinctions, the concept of income under both systems is very broad. Both systems also give courts large discretionary powers in cases involving fluctuating, unstable, or indefinite income. In all such cases, the courts have (and use) these powers to ensure that children can actually benefit from real or probable income.

IMPACT OF CUSTODY TIME

The second major difference is that in some cases in Quebec, custody time will automatically affect the basic child support contribution. Therefore, when the non-custodial parent exercises a "prolonged" access right (representing between 20 percent and 40 percent of custody time), the support payment must be readjusted. The impact will be real but mitigated, since only the time exceeding 20 percent is considered. The *Follow-Up Committee Report* confirms that, in practice, this provision has little real financial impact.[34]

In shared custody cases, where both parents have at least 40 percent of custody time of all children, custody time significantly affects contributions, since the basic support contribution (which is prorated to income) will be reduced in proportion to the paying parent's custody time. However, the type of custody arrangement doesn't affect additional expenses (discussed above), which are admitted under somewhat less restrictive conditions in Quebec than under the federal guidelines.

Quebec case law shows that Quebec courts have a method, similar to that used in other provinces, for calculating time physically spent with the child. All Canadian courts have decided to count as custody time any time when a child is under a parent's authority, even if he or she is not physically present with a parent. For example, time spent at day care or school is counted. Furthermore, the courts have decided to count real time—even though, for example, it might represent only half a day. The determining factor is the financial impact of time spent with the child. Therefore, in terms of calculating time spent in the child's presence, courts apply both systems in similar ways.[35]

However, the difference between the systems lies in the *effects* of shared custody. Under the Quebec system, the effect is automatic. Shared custody necessarily implies that both parents must contribute to the child's expenses in proportion to their disposable incomes when the child is in their custody. But infrequent expenses, such as clothing, pose practical difficulties, which have led the courts to arbitrate and specify the obligations of each parent for these expenses.

The Follow-Up Committee has consequently suggested that the general public be better informed of the actual consequences of shared custody.[36] Under the federal guidelines, however, shared custody opens the doors to judicial discretion. In other words, the courts must decide how far shared custody will affect support payments. Moreover, precedents have been established that shared custody does not automatically reduce child support payments; such reductions happen on a case-by-case basis.[37]

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[32] In *Droit de la famille-3000 (4 February 2000), Montreal 500-09-006602-981, [2000] J.Q. No. 162 (C.A.)*, Quebec's Court of Appeal ruled that, in principle, capital gains are included in the definition of income, even though they are not expressly specified in the Quebec Rules.

[33] For example, student loans and bursaries are included in the definition of income within the meaning of section 9 of the Quebec Rules (although the *Follow-Up Committee Report* recommends their exclusion), while they are not considered under the federal guidelines (see to that effect *Chute* v. *Chute* (1999), 2 R.F.L. (5th) 377 (Sask. Q.B.)).

[34] In comparing the monthly median support payment for various types of custody, the Committee noted that this amount is $303 when the mother has sole custody and $279 when she has custody but the father has visiting and prolonged access rights (Government of Quebec, *Follow-up Committee Report*, p. 124, *supra* note 29). This shows that in determinations of support payments, the concept of prolonged access rights does not significantly change the results.

[35] For Quebec Rules, see the Court of Appeal's decisions in *Droit de la famille-3443* (1 November 1999), Montreal 500-09-007691, [1999] J.Q. No. 4890 (C.A.) and *Droit de la famille-3165* (29 October 1998), *Montreal 500-09-006378-988, [1998] A.Q. No. 3164 (C.A.)*. For the federal guidelines, see, in particular, *Hall* v. *Hall* (1997), 35 B.C.L.R. (3d) 311, 30 R.F.L. (4th) 333 (S.C.); *de Goede* v. *de Goede* (3 February 1999), Courtenay D4928, [1999] B.C.J. No. 330 (B.C.S.C.) [hereinafter *de Goede*]; *Meloche* v. *Kales* (1997), 35 O.R. (3d) 688, 35 R.P.L. (4th) 297 (Ont. Gen. Div.) [hereinafter *Meloche*]; *Dennett* v. *Dennett* (1998), 225 A.R. 50, [1998] 10 W.W.R. 725 (Q.B.); *Anderson* v. *Anderson* (2000), 5 R.F.L. (5th) 235 (B.C.S.C.).

[36] Government of Quebec, *Follow-up Committee Report*, p. 127, *supra* note 29.

UNDUE HARDSHIP

The third significant difference involves undue hardship. The specific conditions of each type of hardship may vary from one system to another. For instance, hardship may result from exercising access rights. In Quebec, the courts are not required to first assess the "excessive" nature of the expense, as they are under the federal guidelines. Beyond cases in which access rights could be jeopardized due to unusually high expenses, Quebec courts do not generally consider these expenses to be undue hardship.

Both methods of assessing undue hardship are significantly differentiated by another factor. The federal guidelines provide a comparison of household standards of living. Under the Quebec Rules, both parents, even the one whose standard of living is greater, may claim undue hardship. Consequently, case law shows that a paying parent in Quebec can apply to reduce support payments because of the high cost of exercising visiting rights.

Again, the distinction here is less dramatic than it first appears. Precedents set in Quebec and in the other provinces have somewhat restricted the way undue hardship can be applied.[38] Under both systems, courts have ruled that having a second family or additional support payments does not automatically reduce child support, and that the mere fact that one parent earns less than the other does not necessarily constitute undue hardship.

On the other hand, even in Quebec, the courts are somewhat inclined to compare incomes, albeit somewhat informally.[39] This tendency is quite understandable since they must determine whether hardship is "undue," a task that implies assessing income. The Quebec Court of Appeal itself emphasized that "referring to the overall circumstances and taking the value of a parent's assets into account enables us to consider the discrepancy between the parents' respective financial means."[40]

Therefore, the courts may compare the standards of living of the parents without being obliged to do so, as is the case under the federal guidelines. In fact, the Follow-Up Committee formally rejected the idea of introducing a compulsory standard-of-living comparison test, saying that such a test would be too great a burden for some parents.[41] However, it did note that in almost half of the cases involving undue hardship, the courts took into account the income of other household members.

ADDITIONAL EXPENSES

Sometimes, additional expenses allow the courts to exceed the amounts specified in the tables. Here, both systems apply the test of *necessity* of the expenses, given the child's needs, and of *reasonableness*, given the parents' respective resources. Both of these factors must be established since additional expenses are an exception to the rule (under both systems) that the amounts in the tables adequately fulfill the child's needs.[42]

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[37] See, for example, *Green* v. *Green* (2000), 75 B.C.L.R. (3d) 306, 6 *R.F.L. (5th) 197 (C.A.).*

[38] Government of Quebec, *Follow-Up Committee Report*, pp. 152–153, *supra* note 29. The Committee observed that [*translation*] "since this type of request is an exception to a strict application of the model, the rather restrictive interpretation of the majority of cases studied seems normal and complies with the overall model." For the federal guidelines, see *Van Gool* v. *Van Gool* (1998), 64 B.C.L.R. (3d) 90, 44 R.F.L. (4th) 319 (C.A.); *Ellis* v. *Ellis* (1999), 175 N.S.R. (2d) 268, 45 R.F.L. (4th) 234 (C.A.).

[39] See *Droit de la famille-3592* (6 April 2000), Rimouski 100-12-007622-99, [2000] J.Q. No. 1476 (S.C.).

[40] *Droit de la famille-2569* (13 August 1998), Quebec 200-09-001881-983, [1998] A.Q. No. 2547 at para. 26 (C.A.) [translated by author].

[41] Goverrnment of Quebec, *Follow-Up Committee Report*, pp. 152–153, *supra* note 29.

[42] *Kofoed* v. *Fichter* (1998), 168 Sask. R. 149, 39 R.F.L. (4th) 348 (C.A.) [hereinafter *Kofoed*].

The federal guidelines also consider the family's spending pattern before the parents separated. The Quebec rules do not mention this expressly, although Quebec case law regularly refers to the household standard of living before separation.[43] Furthermore, the federal guidelines require that expenses related to education (other than post-secondary education) and extra-curricular activities be extraordinary to be considered as an additional expense. Precedents involving both the federal guidelines and the Quebec rules have already established that these expenses, such as those related to extracurricular activities, will only be taken into account if the activity itself is considered exceptional or when it costs significantly more than what families of similar economic backgrounds usually pay. Therefore, despite differences in the wording of the texts, the courts seem to be applying a test that refers to each household's specific financial situation.[44]

INDEXATION

Under Quebec's *Civil Code*, amounts specified in support orders are automatically indexed on January 1 of each year, unless otherwise specified by the court. Therefore, in Quebec, the amounts specified in the table appended to the rules are indexed annually.[45] The federal guidelines do not index amounts in the tables, but paying parents must periodically provide information regarding income, which makes it easier to update amounts when receiving parents ask for changes to child support orders.

It is hard to tell whether amounts under the federal tables are somewhat higher than the provincial amounts. The federal guidelines assume that the custodial parent will automatically contribute in proportion to his or her financial ability, while the Quebec system expressly considers the income of both parents. In Quebec, amounts will be higher for lower income parents, but will be lower for higher income parents.[46]

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[43] *Droit de la famille-3210*, [1999] R.D.F. 73 (Que. Sup. Ct.).

[44] *Racette* v. *Gamauf*, (1997) 158 Nfld. & P.E.I.R. 38, 35 R.F.L. (4th) 357 (S.C. (T.D.)); *Droit de la famille-3228*, [1999] R.D.F. 422 (Que. C.A). Recent decisions in Quebec tend to use public statistical data to determine the proportion of certain items of expenditure allotted in families' budgets (see, for example, *Droit de la famille-3228, ibid.* and *Droit de la famille-3763*, J.E. 2000-2266 (C.S.), where the court considered that 5 percent of the family budget would be allotted to recreation according to Canadian standards).

[45] However, the Follow-Up Committee recommended that the basic deduction of $9000—the threshold level under which a person is not expected to pay support—should also be indexed to encourage support debtors to make their payments (Government of Quebec, *Follow-Up Committee Report*, p. 147, *supra* note 29).

[46] The courts have also noted this; see *Droit de la famille-2695*, J.E. 97-1321 (C.S.).

4. SECTION-BY-SECTION REVIEW OF THE *FEDERAL CHILD SUPPORT GUIDELINES* AND THE *DIVORCE ACT*

INTRODUCTION

This part of the report examines the workings of the legislative and regulatory child support provisions introduced on May 1, 1997.[47] It analyzes the provisions in detail, identifies any unresolved issues, and recommends any required legislative and regulatory amendments.

The relevant sections of the *Divorce Act* and all of the provisions of the *Federal Child Support Guidelines* are reviewed individually with cross-references to related provisions, where required. For each section, a description of the background and application of the clause precedes an examination of selected case law and any outstanding issues. The history of an amendment to the section since the coming into force of the Guidelines is also provided. Recommendations for amendment are followed by an analysis.

SECTION-BY-SECTION REVIEW OF THE *FEDERAL CHILD SUPPORT GUIDELINES*

SECTION 1: OBJECTIVES

BACKGROUND

This section helps parents and the courts to interpret the Guidelines. The objectives it outlines stem from the objectives and principles of the Federal-Provincial-Territorial Family Law Committee, which the Child Support Project adopted in 1991.[48] These objectives and principles were based on the state of the law in the mid-1990s and on the prospect of future amendments to child support legislation.

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[47] The *Federal Child Support Guidelines* came into force on May 1, 1997 (SOR/97-175) and were amended December 9, 1997 (SOR/97-563), April 1, 1999 (SOR/99-136), November 1, 2000 (SOR/2000-337), and August 1, 2001 (SOR/2001-292) [hereinafter Guidelines].

[48] These objectives and principles were as follows:

Objectives

1. Yield adequate and equitable levels of child support.
2. Produce amounts that are objectively determinable, consistent, and predictable.
3. Ensure flexibility to account for a variety of circumstances.
4. Be understandable and inexpensive to administer.

Principles

1. Parents have legal responsibility for the financial support of their children.
2. Child support legislation should not distinguish between the parents or children on the basis of sex.
3. The determination of child support should be made without regard to the marital status of the parents.
4. Responsibility for the financial support of children should be in proportion to the means of each parent.
5. In determining the means of each parent, his or her minimum needs should be taken into consideration.
6. Levels of child support should be established in relation to parental means.
7. While each child of a parent has an equal right to support, in multiple family situations the interests of all children should be considered.
8. The development of any new approach to the determination of child support should minimize collateral effects (e.g. disincentive to remarriage, joint or extended custody arrangements, and voluntary unemployment or underemployment) to the extent compatible with the obligation to pay child support.

Section 1 has not been amended since the Guidelines came into effect on May 1, 1997.

APPLICATION

For the most part, the section 1 objectives achieved their intended goal. When deciding how to apply various sections of the *Federal Child Support Guidelines*, judges have turned to section 1 for guidance and even inspiration. Although the objectives are an end in and of themselves, they have also become a means, forming the very grounds on which decisions are made.

> **Objectives**
>
> **1.** The objectives of these Guidelines are
>
> (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

> In my view, and that of most others too, the Guidelines have been remarkably successful in achieving the objectives for the new system, set out in s. 1 of the Guidelines: adequacy, objectivity, efficiency, and consistency. Quibble as we might about this or that sub-area of child support law, few would suggest now that we go back to the "old," individualized system.
>
> **Source:** D.A. Rollie Thompson, "Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative." Appeal Courts Seminar, National Judicial Institute, Faculty of Law, Dalhousie University, Halifax, April 19, 1999.

CASE LAW

Generally, the objectives have guided judges in their interpretation of all sections of the *Federal Child Support Guidelines*.[49]

In *Francis* v. *Baker*,[50] for example, the Ontario Court of Appeal recognized that the Guidelines were intended "to replace the haphazard with the predictable" and thus, through the application of an objective standard, "to help parents resolve child support issues as expeditiously as possible."

Communications and Consultation Branch, *Summary: Federal-Provincial-Territorial Family Law Committee's Report and Recommendations on Child Support* (Ottawa: Department of Justice, Communications and Consultation Branch, January 1995), p. 19.

[49] ***Francis* v. *Baker* (1998), 38 O.R. (3d) 481, 34 R.F.L. (4th) 228 (C.A.), aff'd [1999] 3 S.C.R. 250, 50 R.F.L. (4th) 228 (S.C.C.) [hereinafter *Francis* cited to S.C.R.].**

[50] ***Ibid.***

That judges have applied the objectives is proven by cases in which they have limited their own discretion.[51] According to the British Columbia Court of Appeal in *Metzner* v. *Metzner*,[52] "[I]t was Parliament's intention that there be a presumption in favour of the Table amounts in all cases" and that "there must be clear and compelling evidence for departing from the Guidelines figures." It seems that, across the nation, judges are generally and consistently ordering the table amounts as prescribed by the Guidelines.[53]

Judges usually see the objectives as a general starting point. However, a review of the case law suggests that judges cite objectives (a) and (d) most frequently. For example, in *Hanmore* v. *Hanmore*,[54] the Alberta Court of Appeal had to determine whether it was correct for the chambers judge to reduce the amount of child support on the basis of undue hardship. In deciding that the burden of establishing undue hardship must be heavy, the court expressly cited objectives (a) and (d):

> The Child Support Guidelines provide a detailed road map for the Court to follow in deciding whether guideline amounts should be reduced because of undue hardship. … The objectives of the Guidelines are set out in s. 1. The primary objectives are "to establish a fair standard of support for children that will ensure that they continue to benefit from the financial means of both spouses after separation," and "to ensure consistent treatment of spouses and children who are in similar circumstances." Such objectives will be defeated if the Courts adopt a broad definition of "undue hardship" or if such applications become the norm rather than applying to exceptional circumstances. That has been the consistent message of the Courts since the Guidelines came into force. … It is evident from these authorities that the burden of establishing a claim of undue hardship is a heavy one. We agree with the comment of Wright J. that the objectives of the Guidelines will be defeated if Courts deviate from the established guidelines without compelling reasons.[55]

Even before the provinces and territories actually adopted child support guidelines, judges were citing section 1 objectives in their decisions. In *Channer* v. *Hoffman-Turner*,[56] the case of an unmarried couple, the judge said:

> I am of the view that it is appropriate to apply those guidelines in situations of both married and unmarried persons in order that children may be treated fairly. The objectives of the child support guidelines include the need to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation and to ensure consistent treatment of spouses and children who are in similar circumstances. In my view, in similar financial circumstances, we would be treating children of parents who were unmarried differently than children of parents who were married by using different parameters to deal with the issue of child support. I do not believe that that is appropriate nor does it ensure that children in similar circumstances are treated consistently. I am of the view, therefore, that it is appropriate to utilize the *Federal Child Support Guidelines* in calculating support for the two children in this case.[57]

The judge took the same approach in *D.L.* v. *F.K.*[58]

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[51] For example, in *Dergousoff* v. *Schille (Dergousoff)* (1999), 177 Sask. R. 64, 48 R.F.L. (4th) 1 (C.A.) [hereinafter *Dergousoff*] the Saskatchewan Court of Appeal refused to follow *Wang* v. *Wang* (1998), 58 B.C.L.R. (3d) 1, 39 R.F.L. (4th) 426 (C.A.) [hereinafter *Wang*] and decided that section 14 of the Guidelines mandated a modification of pre-guidelines child support orders. See also *Bates* v. *Bates* (2000), 49 O.R. (3d) 1, 5 R.F.L. (5th) 259 (C.A.) [hereinafter *Bates*], where the Ontario Court of Appeal agreed with the *Dergousoff* judgment, but because of a technical issue, could not reverse the previous Court of Appeal decision of *Sherman* v. *Sherman* (1999), 44 O.R. (3d) 411, 45 R.F.L. (4th) 424 (C.A.) [hereinafter *Sherman*], which had adopted *Wang*.

[52] *Metzner* v. *Metzner* (2000), 80 B.C.L.R. (3d) 133, 9 R.F.L. (5th) 162 at para. 30 (C.A.) [hereinafter *Metzner*].

[53] See *O'Connell* v. *McIndoe* (2000), 8 R.F.L. (5th) 326 (B.C.S.C.); *Dreichel* v. *Dreichel* (2000), 267 A.R. 128, 8 R.F.L. (5th) 253 (Q.B.); *Orszak* v. *Orszak* (2000), 8 R.F.L. (5th) 350 (Ont. Sup. Ct. Just.); *Fisher* v. *Heron* (1997), 157 Nfld. & P.E.I.R. 42 (P.E.I. S.C.(T.D.)).

[54] *Hanmore* v. *Hanmore* (2000), 225 A.R. 163, 4 R.F.L. (5th) 348 (C.A.).

[55] *Ibid.* at para. 9–10, 17.

[56] *Channer* v. *Hoffman-Turner* (1997), 214 A.R. 354 (Q.B.).

[57] *Ibid.* at para. 12.

[58] *D.L.* v. *F.K.* (17 March 1998), Yellowknife 99-00171, [1998] N.W.T.J. No. 42 (S.C.).

In Alberta, where, as of the publication of this report, there are no provincial child support guidelines, the Court of Appeal declared:

> Therefore, equal treatment of children within Alberta through application of the [Federal] Guidelines under the *Parentage and Maintenance Act* would have the additional desirable effect of minimizing inconsistent treatment and increasing predictability of orders from one province or territory to another.[59]

RECOMMENDATION

No amendments to this section are recommended.

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[59] ***Cavanaugh*** **v.** ***Ziegler*** **(1998), 228 A.R. 283, 43 R.F.L. (4th) 40 at para. 12 (C.A.).**

SECTION 2: INTERPRETATION

Section 2 defines various words and terms found throughout the Guidelines. It also helps both parents and judges interpret certain sections or expressions. Subsection 2(1) contains the actual definitions. Subsection 2(2) covers words found specifically in sections 15 to 21. Subsection 2(3) advises parents and judges that they must use the most current information possible when determining any dollar amount when working with the Guidelines. Subsection 2(4) sets out the particular situations, in addition to child support orders, to which the Guidelines apply. Subsection 2(5) deals with recalculations by provincial child support services.

Section 2 has not been amended since the Guidelines came into effect on May 1, 1997.

Definitions

2.(1) The definitions in this subsection apply in these Guidelines.

"Act" «*Loi*»

"Act" means the *Divorce Act*.

"child" «*enfant*»

"child" means a child of the marriage.

"income" «*revenue*»

"income" means the annual income determined under sections 15 to 20.

"order assignee" «*cessionnaire de la créance alimentaire*»

"order assignee" means a minister, member or agency referred to in subsection 20.1(1) of the Act to whom a child support order is assigned in accordance with that subsection.

"spouse" «*époux*»

"spouse" has the meaning assigned by subsection 2(1) of the Act, and includes a former spouse.

"table" «*table*»

"table" means a federal child support table set out in Schedule I.

APPLICATION

Subsections 2(1), (2), (4), and (5) have generally been applied consistently and as intended.

There is confusion about whether subsection 2(3) or sections 15 to 20 (which look at various aspects of calculating income) apply when both current income information and historical income information of the paying parent are available.

Child support guidelines apply to provisional orders made under section 18 of the *Divorce Act*, even though subsection 2(4) does not specifically refer to provisional orders under section 18.[60]

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[60] **When a person applies to vary a support order and the other party lives in another province or territory, the court hearing the application can make a provisional order under section 18 of the *Divorce Act*. This provisional order has no legal effect until it has been confirmed under section 19 of the Act by a court in the province or territory where the other party lives.**

CASE LAW

SUBSECTION 2(1)

Many courts have applied the definitions in subsection 2(1).[61] These definitions have not given the courts any difficulties.

Income Tax Act

(2) Words and expressions that are used in sections 15 to 21 and that are not defined in this section have the meanings assigned to them under the *Income Tax Act*.

Most current information

(3) Where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used.

Application of Guidelines

(4) In addition to child support orders, these Guidelines apply, with such modifications as the circumstances require, to
  (a) interim orders under subsections 15.1(2) and 19(9) of the Act;
  (b) orders varying a child support order;
  (c) orders referred to in subsection 19(7) of the Act; and
  (d) recalculations under paragraph 25.1(1)(*b*) of the Act.

Recalculations

(5) For greater certainty, the provisions of these Guidelines that confer a discretionary power on a court do not apply to recalculations under paragraph 25.1(1)(b) of the Act by a provincial child support service.

SUBSECTION 2(3)

The Newfoundland Court of Appeal applied subsection 2(3) in *Lee* v. *Lee*.[62] The court accepted the trial judge's decision to base the paying parent's income on his foreseeable projected income rather than on his historical income. The paying parent proved that, because he lost his job and was relying on employment insurance, his income was substantially reduced from what it had been in the previous three taxation years. Although historical data usually provides the best forecast of current ability to pay, in this case the court said that it would be ignoring the reality of the situation by relying on this data. The court said that subsection 2(3) supports this analysis by inference since it requires the use of "the most current information" when determining any amounts for the purposes of the Guidelines.

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[61] *Mills* v. *Mills* (10 October 1997), Kamloops 98-01834, [1997] B.C.J. No. 2258 (S.C.) ("income"); *O'Hara* v. *O'Hara* (1997), 33 R.F.L. (4th) 37 (Sask. Q.B.) ("income"); *Schick* v. *Schick* (8 July 1997), Regina 97-15193, [1997] S.J. No. 447 (Q.B.) [hereinafter *Schick*] ("income"); *Meloche, supra* note 35 ("table").

[62] *Lee* v. *Lee* (1998), 167 Nfld. & P.E.I.R. 176, 43 R.F.L. (4th) 339 (Nfld. C.A.).

The British Columbia Court of Appeal addressed this issue in *Bell* v. *Bell*.[63] This case involved a paying parent whose annual income fluctuated by as much as $50,000 from year to year. The trial judge had determined the paying parent's annual income by averaging the parent's total income for the previous three years. The Court of Appeal said that the amount that the paying parent was currently earning (which in this case was over $10,000 less than the average) was a more realistic indicator of the parent's current ability to pay than the average earnings figure. The court held that this is particularly true in an economy in which employment is often scarce and there can be wide fluctuations in income earned from year to year.

In accordance with subsection 2(3), courts have consistently held that the most current income information available should be used.[64] Lower court judges have said that subsection 2(3) obliges parents to make the most current information available to the court.[65] Judges have also said that when current information appears to be a reliable indication of current earnings, subsection 2(3) allows this information to be used rather than historical information[66] or information about anticipated earnings.[67]

In *Ireland* v. *McMillan*,[68] the paying parent admitted to earning income from a university position but would not disclose the amount because he had already disclosed his income information once that year as required under section 25. The court agreed with the paying parent. The judge said that if either parent had based his or her position on subsection 2(3) alone, the judge would have been compelled to apply section 25, because subsection 2(3) is a general section that may not override the specific disclosure provisions in other sections of the Guidelines.

In *Giene* v. *Giene*,[69] the issue was whether the judge, when estimating corporate income, should take an average according to section 17, look at the most recent taxation year according to paragraph 18(1)(a), or consider the projected loss under subsection 2(3). The judge found that subsection 2(3) should not be interpreted to mean that the most current information is limited to information regarding a time period that has not yet expired; otherwise, judges could never look at the most recent taxation year when a parent was able to project the subsequent year's income. The judge also said that "the 'most current information' refers to the most current information where an amount is determined on the basis of specified information."[70]

The judge found that section 17 allowed the corporation's historical pattern of income to be considered, as well as the evidence that the upcoming year would not be as profitable as past years had been. The judge reasoned that the spirit of the Guidelines is to arrive at a fair and equitable determination of income on which to base child support so that the children benefit from the financial means of both spouses after separation. Thus, a strict interpretation of any one section often would not produce this result, particularly when a judge uses a "snapshot" of the corporate income at any one time.

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[63] *Bell* v. *Bell* (1999), 1 R.F.L. (5th) 1 (B.C.C.A.). See also *Good* v. *Good* (24 September 1998), Kelowna 99-01133, [1998] B.C.J. No. 2316 (B.C.S.C.).

[64] *Lewkoski* v. *Lewkoski* (1998), 40 R.F.L. (4th) 86 (Ont. Ct. Just. (Gen. Div.)); *Vincent* v. *Tremblett* (13 October 1998), Newfoundland 99-01210, [1998] N.J. No. 292 (S.C.); *Chambers* v. *Chambers* [1998] N.W.T.R. 252, 40 R.F.L. (4th) 351 (S.C.); *Welsh* v. *Welsh* (3 November 1998), St. Catharines 99-04111, (1998) 79 O.T.C. 81 [1998] O.J. No. 4550 (Ct. Just. (Gen. Div.)) [hereinafter *Welsh*].

[65] *Stupak* v. *Stupak* (1997), 155 Sask. R. 286 (Q.B.).

[66] *Schick*, *supra* note 61; *Smith* v. *Hookey* (1999), 179 Nfld. & P.E.I.R. 205 (Nfld. S.C.); *Stevens* v. *Boulerice* (1999), 49 R.F.L. (4th) 425 (Ont. Sup. Ct. Just.).

[67] *Songui* v. *Songui* (29 May 1998), New Westminster 98-14052, [1998] B.C.J. No. 1379 (B.C.S.C.).

[68] *Ireland* v. *McMillan* (1997), 136 Man. R. (2d) 314 (Q.B.) [hereinafter *Ireland*].

[69] *Giene* v. *Giene* (1998), 234 A.R. 355 (Q.B.).

[70] *Ibid.* at para. 11.

SUBSECTION 2(4)

While there has been no difficulty applying the Guidelines to provisional orders under the *Divorce Act*, in some early cases under provincial and territorial guidelines, judges were reluctant to apply those guidelines in provisional hearings. For example, see *Wieler* v. *Switzer*,[71] where Justice Raven concluded that British Columbia's child support guidelines do not apply to provisional hearings.[72]

However, the issue of whether provincial or territorial guidelines apply in provisional hearings appears to have been settled. In *Dunne* v. *Kehler*,[73] the mother appealed. The appeal court judge concluded that provincial child support guidelines were applicable to provisional orders.[74]

Referring to subsection 2(4), judges have said that the Guidelines apply to interim orders[75] and to orders varying a child support order.[76] For example, the British Columbia Court of Appeal found in *Shankland* v. *Harper*[77] that, under subsection 2(4), the inescapable conclusion is that Parliament intended all variation orders, retroactive or prospective, to follow the Guidelines, as nothing in the Guidelines refers specifically to arrears nor suggests that a distinction be made between a retroactive and a prospective variation order.

RECOMMENDATION

The federal Department of Justice recommends no amendments to section 2 for the time being. The Department is reviewing sections 18 and 19 in light of the anticipated implementation of the Inter-jurisdictional Support Orders Act at the provincial and territorial level. Subsection 2(4) will be amended to reflect any changes to sections 18 and 19.

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[71] ***Wieler* v. *Switzer* (18 August 1998), Surrey 98-19051, [1998] B.C.J. No. 2231 (Prov. Ct.) [hereinafter *Wieler*].**

[72] **Where a person applies to vary child support in a divorce judgement and the other party lives in another province or territory, the court hearing the application can make a provisional order under section 18 of the *Divorce Act*. This provisional order has no legal effect until it has been confirmed under section 19 of the Act by a court in the province or territory where the other party lives.**

[73] ***Dunne* v. *Kehler* (1999), 180 D.L.R. (4th) 536, 3 R.F.L. (5th) 35 (B.C.S.C.) [hereinafter *Dunne*].**

[74] **Both *Wieler* and *Dunne* were decided under provincial laws. However, they both referred to similar provisions in the federal laws.**

[75] ***Beilstein* v. *Beilstein* (1999), 47 R.F.L. (4th) 242 (N.W.T. S.C.); *Bolton* v. *Messett* (29 September 1999), Burnaby F6120, [1999] B.C.J. No. 2950 (Prov. Ct.).**

[76] ***Welsh*, *supra* note 64.**

[77] ***Shankland* v. *Harper* (1999), 60 B.C.L.R. (3d) 242, 43 R.F.L. (4th) 379 (C.A.).**

SECTION 3: AMOUNT OF CHILD SUPPORT

SUBSECTION 3(1): PRESUMPTIVE RULE

Subsection 3(1) sets out that the starting point for a child support order is the basic amount in the applicable table for the appropriate number of children and the income of the paying parent.[78] Any additional amount for section 7 "special" expenses may be added to that basic amount.[79] The table amount represents the minimum amount of child support that the paying parent must pay, but judges may reduce or increase the child support amount when the *Divorce Act* or Guidelines allow.

Subsection 3(1) has not been amended since the Guidelines came into effect on May 1, 1997.

Presumptive rule

3.(1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
- (b) the amount, if any, determined under section 7.

APPLICATION

This subsection has generally been applied consistently and as intended.

CASE LAW

Judges regularly order the child support amounts listed in the applicable table, basing the order on the income of the paying parent and the number of children involved plus any additional amount for special or extraordinary expenses under section 7.[80]

In *Meuser*,[81] the father argued that despite the fact that his children were from two marriages (two families), he should be considered a father of three children (one family) for the purposes of the Guidelines. That is, the father argued that his child support obligation should reflect the table amount for three children, which is less than the sum of the table amounts calculated separately for two children and one child. The judge rejected this argument saying that subsection 3(1) deals with this situation by stating that the relevant child support amount pertains to children "to whom the order relates," indicating that there is one order for each family.

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[78] There are eight situations in which judges can order an amount of child support other than the table amount: children at or over the age of majority (section 3), incomes over $150,000 (section 4), spouse in place of a parent (section 5), split custody (section 8 table set-off), shared custody (section 9), undue hardship (section 10); special provisions have been made for the benefit of a child (subsection 15.1(5) of the *Divorce Act*), and by agreement of the parties (subsection 15.1(7) of the *Divorce Act*).

[79] For a detailed review of section 7, please see "Section 7: Special or Extraordinary Expenses."

[80] See, for example, *Francis*, *supra* note 49; *Birss* v. *Birss* (2000), 12 R.F.L. (5th) 9 (Ont. Sup. Ct. Just.); *Butzelaar* v. *Butzelaar* (1998), 174 Sask. R. 125 (Q.B.) [hereinafter *Butzelaar*]; *Digout* v. *Digout* (1999), 180 N.S.R. (2d) 70, 178 D.L.R. (4th) 588 (C.A.); *Duncan* v. *Duncan* (1999), 178 D.L.R. (4th) 760, 1 R.F.L. (5th) 46 (B.C.C.A.); *Garrison* v. *Garrison* (1998), 38 R.F.L. (4th) 435 (Ont. Ct. Just. (Gen. Div.)) [hereinafter *Garrison*]; *McCarthy* v. *McCarthy*, [1998] N.W.T.R. 344 (S.C.); *Meuser* v. *Meuser* (1998), 58 B.C.L.R. (3d) 131, 43 R.F.L. (4th) 140 (C.A.) [hereinafter *Meuser* cited to B.C.L.R.]; *Meyers* v. *Meyers* (16 April 1998), Saskatoon 98-19317, [1998] S.J. No. 265 (Q.B.); *Ness* v. *Ness* (1998), 125 Man. R. (2d) 173, [1998] W.W.R. 404 (Q.B.); *Vivier* v. *Vivier* (1997), 120 Man. R. (2d) 231 (Q.B.).

[81] *Ibid.*

There are situations when the judge can deviate from the table amount. For example, when the paying parent can demonstrate that undue hardship, under section 10 of the Guidelines, would result from him or her having to pay the table amount, the judge can order another amount.[82] Similarly, when the income of the paying parent exceeds $150,000, the judge, under section 4, may order an amount higher or lower than the table amount.[83]

RECOMMENDATION

No amendments to this subsection are recommended.

SUBSECTION 3(2): CHILDREN AT OR OVER THE AGE OF MAJORITY

Parents and judges determine whether older children qualify for child support by referring to section 2 of the *Divorce Act.*[84] When these children are eligible for support, the amount is decided in accordance with subsection 3(2). Judges must apply the Guidelines as if the children were under the age of majority, unless that approach is inappropriate.[85]

> ***Child the age of majority or over***
>
> 3(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
>
> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

Parents who feel that an order of the table amount plus section 7 expenses is inappropriate must convince the judge of this. When this is the case, judges are free to order an amount they consider appropriate, keeping in mind the list of factors set out in paragraph 3(2)(b). Older children who are still dependent on their parents may have child support needs different from those of younger children; older children may have part-time jobs or reside away from home.[86] Some families may have already decided on financial arrangements that conflict with the Guidelines approach. For these reasons, judges may decide support for children at or over the age of majority on a case-by-case basis.

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[82] See, for example, *Montalbetti* v. *Montalbetti* (2000), 10 R.F.L. (5th) 377 (B.C.C.A.) [hereinafter *Montalbetti*].

[83] See, for example, *Francis*, *supra* note 49.

[84] For a detailed review of that section, see "Review of Sections of the *Divorce Act* That Relate to Child Support."

[85] There are other situations in which judges can order an amount of child support other than the table amount: incomes over $150,000 (section 4), spouse in place of a parent (section 5), shared custody (section 9), undue hardship (section 10), special provisions have been made for the benefit of a child (subsection 15.1(5) of the *Divorce Act*) and by agreement of the parties (subsection 15.1(7) of the *Divorce Act*).

[86] Costs for a child attending post-secondary school are a special expense listed in paragraph 7(e) of the Guidelines.

Subsection 3(2) has not been amended since the Guidelines came into effect on May 1, 1997.

APPLICATION

There is no definition of the word *inappropriate* in the Guidelines, nor is there any further explanation of its meaning. When deciding whether to order the table amount, one factor that judges have considered is the degree to which the parent with custody of the children is required to maintain a residence for them. In many cases, judges have decided not to order the table amount when the children do not live with the parents. Other factors judges have considered include whether the children earn income, previous financial relationships in the family, the provisions of a separation agreement, and whether the children are the natural children of the paying parent.

In general, judges arrive at an amount of support based on all the evidence about the particular condition, means, needs, and circumstances of the children, as well as on the spouses' financial ability to contribute.

I. APPLICATION OF THE CHILD SUPPORT TABLES

Judges have used several methods to apportion the support amount when at least one child is at or over the age of majority and at least one is under it, and when all children are eligible for support.

Some judges have determined the table value for the children at or over the age of majority and then determined the table value for the children under the age of majority and added these two amounts together.[87] This amount would be larger than the table amount for the total number of children involved because it would not reflect the economies of scale in the table amounts for more than one child.

Other methods of applying the table amounts include the one the judge used in *Cornborough* v. *Cornborough*,[88] when there were three children, one of whom was over the age of majority. The judge found that the child over the age of majority was partially self-sufficient, and so calculated the support order using the tables as though there were 2.5 children of the marriage.

In *Bowering* v. *Bowering*,[89] the judge took an approach more consistent with the intended application of subsection 3(2). In this case, there was one child over the age of majority and three children under the age of the majority. The judge said that when paragraph 3(2)(a) applies, the table amount for the total number of children—in this case four—is used when calculating support.

II. DIRECT PAYMENT OF SUPPORT TO OLDER CHILDREN

Judges have made child support payments payable directly to children at or over the age of majority, although the authority to do so is not expressly stated in the *Divorce Act* or the *Federal Child Support Guidelines*.[90]

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[87] See, for example, *Blair* v. *Blair* (1997), 34 R.F.L. (4th) 370 (Ont. Ct. (Gen. Div.)) where there were two children, one under and one at the age of majority. The court determined the table value for one child, for each of the two children, and added the two figures, resulting in a larger payment than if the court had used the table amount for two children.

[88] *Cornborough* v. *Cornborough* (21 August 1991), Nanaimo 97-14801, [1997] B.C.J. No. 1981 (B.C.S.C.).

[89] *Bowering* v. *Bowering* (1998), 171 Nfld & P.E.I.R. 50 (Nfld. U.F.C.).

[90] Judges may conclude that section 15.1(4) of the *Divorce Act* implicitly gives them the authority to make direct payments to children at the age of majority or over. In *Arnold* v. *Washburn* (2000), 10 R.F.L. (5th) 1 (Ont. Sup. Ct. Just.), Rutherford, J. concluded that the parent's eldest child—a post-graduate student living in England who had not lived with her parents for over three years—continued to be a "child of the marriage." Support was ordered payable directly to the child. In *Waese* v. *Bojman* (28 May 2001), Ontario 00-FA-9426 (Ont. Sup. Ct. Just.), Mesbur, J. ordered support payable directly to a child at the age of majority against the wishes of the paying parent. However, in *Surette* v. *Surette* (23 February 2000), Ontario 7875/99, [2000] O.J. No. 675 (Sup. Ct. Just.), Perkins, J. held that nothing in the Guidelines contemplated an order for direct payment of child support in the absence of consent of the parties and therefore direct payment was not ordered.

Some paying parents suggest that support should always be paid directly to children at or over the age of majority. Many say that older children should be accountable for their own financial decisions, especially when they live away from their parent's home. Direct payments to children may also help ease tension between the parents because paying parents will be assured that the children are receiving the benefits of the support order.

However, parents who receive child support note that they have ongoing expenses, such as maintaining the home, even when the children are away at school for part of the year. When support is paid directly to the children, paying parents may not be compensated for those costs.

Direct payment to children may reduce their right to receive financial assistance, such as student loans and grants.[91] In addition, children who receive direct payments may have to be involved in enforcing the child support order. Children have not traditionally been a part of legal proceedings and historically courts have not wanted to directly involve children of any age in their parents' case. As well, older children may not have the experience or ability to manage large amounts of money.

III. DISCLOSURE

Many parents want proof that their older children are in school and are therefore still entitled to the child support they are paying. Many people suggest that receiving parents and older children should have to show that there is an ongoing need for child support. Paying parents could be allowed to ask once a year for information such as school records, lease agreements, or other financial documents.

Other parents believe that the current rules and methods for disclosure are sufficient and that additional requirements would be intrusive.[92] Some parents think that involving children in their parents' dispute may have negative effects on the children.

RECOMMENDATIONS

Application of the Child Support Tables

No amendment to the way support amounts are apportioned when at least one child is at or over the age of majority and at least one is under the age of majority and both are eligible for support is recommended. Although some judges have used different approaches to calculate the amount of support in these situations, this issue does not warrant a regulatory amendment.

Section 3 clearly directs the court to determine support according to the applicable table for the total number of children who are eligible for support (plus section 7 expenses), unless paragraph 3(2)(b) applies. That is, unless there is a child at the age of majority or over and support calculated according to the guidelines would be "inappropriate," one must use the table values for the total number of children. Overriding judicial discretion pursuant to paragraph 3(2)(b) ensures that this approach will not be used if it is inappropriate.

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[91] For example, under the Canada Student Loans Program, student need is determined partly on the basis of the student's income. Income is defined to include "gross income from all sources, including alimony and/or maintenance received." Thus, child support received could adversely affect the amount of a Canada Student Loan. In Ontario, the Ontario Student Assistance Program requires each applicant to estimate "total gross income," which includes child support payments received. Therefore, any child support the student receives directly could reduce financial support.

[92] Although the Guidelines do not specify a continuing obligation to provide financial disclosure for a child at the age of majority or over, some judges have ordered such disclosure as a condition of ongoing entitlement to child support: *Brown* v. *Brown* (1993), 45 R.F.L. (3d) 444 (B.C.S.C.); *Davids* v. *Davids* (3 July 1998), Ontario 98-13376, [1998] O. J. No. 2859 (Ont. Ct. Just. (Gen. Div.)), aff'd (1999), 125 O.A.C. 375 (C.A.) [hereinafter *Davids*].

Direct Payment of Support to Older Children

For the reasons set out below, no amendment is recommended to address the issue of direct payment of support to children the age of majority or over at this time. The current practice of ordering direct payments of child support to children the age of majority or over when the parties agree or when the court considers it appropriate is consistent with the Divorce Act.

Courts have made child support payments payable directly to children at the age of majority or over (and to other third parties) in appropriate circumstances, sometimes against the wishes of the parent who would otherwise receive the support. The authority to do so is not expressly outlined in the Divorce Act or the Federal Child Support Guidelines, but may be implicit in subsection 15.1(4) of the Divorce Act.

In some cases, courts have concluded that they have no authority to order direct child support payments without the consent of all parties. However, because appellate courts have not addressed the issue, it would be premature to legislate in this area.

Disclosure

The federal Department of Justice recommends that spouses should have to disclose financial and status information concerning the child on the written request of the other spouse, when the child is at the age of majority or over, even when the case does not involve special expenses. These special expenses, such as tuition for post-secondary education, are those that are beyond what is covered by the child support table amount. Under the Guidelines, there is a section that requires parents to produce records regarding special expenses. However, this provision does not extend to producing information about other expenses that may be paid with the table amount or another amount paid for older children.

SUBSECTION 3(3): APPLICABLE TABLE

Subsection 3(3) directs parents and judges to the appropriate table when determining child support amounts.

Under paragraph 3(3)(a), when one seeks an order against a spouse who resides in Canada, one uses the applicable table for the province or territory in which the spouse ordinarily resides at the time of the application. There are further provisions for situations when the spouse has changed residence since the application was made or is expected to do so soon. In these cases, the appropriate table is the one for the province or territory where the spouse now resides or is about to reside.

Under paragraph 3(3)(b), if one is seeking an order against a spouse whose residence is unknown or outside Canada, one uses the table for the home province or territory of the spouse seeking the order.

Subsection 3(3) was amended in 1997 to allow judges, when informed before making an order that the paying parent's place of residence had or would change, to use the table for the new place of residence when determining the child support amount. Prior to the amendment, judges had to use the table for the paying parent's province or territory of residence at the time the application was made, even when that meant that the paying parent would be subject to a different income tax rate.

APPLICATION

This subsection has generally been applied as intended.

Applicable table

3(3) The applicable table is

- (a) if the spouse against whom an order is sought resides in Canada,
  - (i) the table for the province in which that spouse ordinarily resides at the time the application for the child support order, or for a variation order in respect of a child support order, is made or the amount is to be recalculated under section 25.1 of the Act,
  - (ii) where the court is satisfied that the province in which that spouse ordinarily resides has changed since the time described in subparagraph (i), the table for the province in which the spouse ordinarily resides at the time of determining the amount of support, or
  - (iii) where the court is satisfied that, in the near future after determination of the amount of support, that spouse will ordinarily reside in a given province other than the province in which the spouse ordinarily resides at the time of that determination, the table for the given province; and
- (b) if the spouse against whom an order is sought resides outside of Canada, or if the residence of that spouse is unknown, the table for the province where the other spouse ordinarily resides at the time the application for the child support order or for a variation order in respect of a child support order is made or the amount is to be recalculated under section 25.1 of the Act.

SOR/97-563, s.1

CASE LAW

Judges have applied paragraph 3(3)(a) consistently and straightforwardly, using the table for the province or territory in which the parent who will be paying the child support ordinarily resides.[93]

Paragraph 3(3)(b) has also been applied consistently and as intended. In *Barrie* v. *Barrie*,[94] for example, the paying parent lived in Bermuda. Thus, the child support order was determined using the table for Alberta, where the other spouse lived when applying for support. Similarly, in *Butzelaar* v. *Butzelaar*,[95] because the paying parent's place of residence was unclear due to the variable nature of his employment, the judge used the child support tables for the province where the other spouse lived.

RECOMMENDATION

No amendments to this subsection are recommended.

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[93] See, for example, *A.H.* v. *M.C.G.* (4 April 1997), Montreal 1997-0268, [1997] A.Q. No. 2736 (S.C.); *A.G.* v. *D.L.* (8 September 1997), Quebec 1997-0381, [1997] A.Q. No. 3112 (S.C.); *Cederland* v. *Cederland* (1997), 32 R.F.L. (4th) 35, [1997] N.W.T.R. 319 (S.C.); *Dixon* v. *Tovell* (19 May 1999), Ottawa D0022/97 (Sup. Ct. Just.); *McCarthy* v. *McCarthy*, [1998] N.W.T.R. 344 (S.C.).

[94] *Barrie* v. *Barrie* (1998), 230 A.R. 379 (Q.B.). See also *Garrison, supra* note 80. In that case, the paying spouse had relocated to the United States, so the table from Ontario—the province where the non-paying spouse ordinarily lived—was determined to apply.

[95] *Butzelaar* v. *Butzelaar, supra* note 80.

SECTION 4: INCOMES OVER $150,000

Section 4 helps parents and judges assess child support when the paying parent's income is over $150,000. Under this section, child support can be calculated by one of two methods: by using the table amount alone, or by using the table amount for the first $150,000 and adding a discretionary amount for the balance of the income. An amount for section 7 (special) expenses may also be included.

Incomes Over $150,000

4. Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is
   (a) the amount determined under section 3; or
   (b) if the court considers that amount to be inappropriate,
      (i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
      (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
      (iii) the amount, if any, determined under section 7.

When the Guidelines were developed, it was decided that child support tables would list child support amounts for incomes up to $150,000 and would recognize that judges should have discretion to set the child support amount for the portion of income over $150,000. This discretion is based on whether the judge considers the table amount to be inappropriate given the circumstances of the case.

- Only 1.3 percent of all cases from October 1998 to February 2001 involved paying parents with incomes of over $150,000 (319 out of 23,688 cases).
- Of these 319 cases, 50 percent involved parents with an income of between $150,000 and $200,000.
- There was no significant difference between the number of contested cases involving paying parents with incomes of more than $150,000 (11 percent) and incomes of less than $150,000 (12 percent).
- The proportion of contested cases peaks when the paying parent's income is between $160,000 and $170,000. Only 8 percent of cases involving paying parents with an income of more than $170,000 were litigated.

Source: Survey of Child Support Awards database, February 2001.

The $150,000 threshold was selected because in the mid-1990s incomes of $150,000 were regarded as being at the high end of the income spectrum. At that time, only a small percentage of Canadians earned this amount or more each year. As a result, the vast majority of cases would involve lower incomes, to which the table amounts would apply.

APPLICATION

This section has generally been applied as intended.

CASE LAW

In *Francis* v. *Baker*,[96] the Supreme Court of Canada held that the word *inappropriate* in section 4 should be defined expansively to mean *unsuitable* rather than simply *inadequate*, as the Ontario Court of Appeal had said. This would give judges the discretion to either increase or decrease the amount of child support when the table amounts would be far in excess of, or insufficient to meet, the children's needs. This, in turn, would allow for a proper balance between the predictability, consistency, and efficiency components of the Guidelines' objectives and the principles of fairness, flexibility, and recognition of the "condition, means, needs and other circumstances of the children."

The Supreme Court held that the Guidelines include a presumption in favour of the table amounts. The parent requesting a deviation from the table amount must successfully argue against this presumption. The parent must also present clear and compelling evidence showing that the applicable table amount is inappropriate, although he or she does not have to testify. Judges do not accept arguments based on the sheer size of the order, given the presumption in favour of the table amounts and the fact that these arguments do not take into account the needs of the children.

- In contested cases involving a paying parent with an income of $150,000 or more, the judge ordered the table amount or more in almost all cases.
- In uncontested cases, the parents consented to the table amount or more in the vast majority of cases.

Source: Survey of Child Support Awards database, February 2001.

SUBSEQUENT LITIGATION: TABLE AMOUNT ORDERED

In *Hollenbach* v. *Hollenbach*,[97] the British Columbia Court of Appeal applied the Supreme Court's reasoning in *Francis*, stating that there was no basis for deviating from the table amount ($7,276 per month for two children based on the paying parent's annual income of $711,544). This was because the paying parent had not provided clear and compelling evidence of the inappropriateness of the amount. The Court of Appeal held that the Supreme Court decision required judges to look at the unique economic situation of high-income earners at the threshold stage and "that the level of expenses, which would support the table amount, must be unarguably excessive."[98] In this case, the paying parent had to demonstrate that, in the context of the standard of living of other children of wealthy parents, the table amount was not useful to the children. The court acknowledged that this placed a formidable onus on the paying parent.

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[96] ***Francis, supra*** **note 49.**

[97] ***Hollenbach*** **v.** ***Hollenbach*** **(2000), 82 B.C.L.R. (3d) 228, 10 R.F.L. (5th) 280 (C.A.) [hereinafter** ***Hollenbach*** **cited to B.C.L.R.].**

[98] ***Ibid.*** **at para. 37.**

The table amount of child support was ordered or consented to in:

- 54 percent of cases where the paying parent's income was equal to or greater than $150,000, and
- 63 percent of cases where the paying parent's income was below $150,000.

Source: Survey of Child Support Awards database, February 2001.

The British Columbia Court of Appeal in *Metzner*[99] held that the actual "condition, means, needs, and other circumstances of the children" are questions of fact, so appeals court judges should defer to the findings of trial judges. In this case, the paying parent failed to provide any evidence of the inappropriateness of the table amount ($12,359 per month for two children based on the paying parent's annual income of $1.25 million) so the court found that there was no reason not to order the table amount.

In *Simon* v. *Simon*,[100] the Ontario Court of Appeal held that the trial judge erred in not ordering the table amount ($9,215 per month for one child based on the paying parent's annual income of US $1 million) as the parent failed to show that the table amount was inappropriate. Moreover, the court held that the needs of the child and the income of the paying parent were the only relevant factors in a section 4 analysis.[101] However, the judge in *Tauber* v. *Tauber*[102] held that in cases applying section 4, the basic needs of the children need not be the dominant consideration, and that reasonable discretionary expenses may be included.[103]

SUBSEQUENT LITIGATION: DEPARTURES FROM TABLE AMOUNTS

Some paying parents have successfully rebutted the presumption in favour of the table amount.[104] In *Tauber*,[105] the Ontario Court of Appeal said that the paying parent had provided evidence that the table amount ($17,000 per month for one child based on the paying parent's annual income of $2.5 million) clearly exceeded the needs of the child and was, therefore, inappropriate. The judge could determine the child support amount based on the factors in subparagraph 4(b)(ii).

An amount *greater* than the table amount was ordered or consented to in:

- 30 percent of cases in which the paying parent's income was equal to or greater than $150,000, and
- 28 percent of cases in which the paying parent's income was less than $150,000.

Source: Survey of Child Support Awards database, February 2001.

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[99] *Metzner, supra* note 52, leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 527.

[100] *Simon* v. *Simon* (1999), 1 R.F.L. (5th) 119 (Ont. C.A.) [hereinafter *Simon*].

[101] A similar conclusion was reached in *Marinangeli* v. *Marinangeli*. (9 May 2001), Ontario 99-FA-7603, [2001] O.J. No. 1765 (Sup. Ct. Just.) [hereinafter *Marinangeli*].

[102] *Tauber* v. *Tauber* (2000), *48 O.R. (3rd) 577*, 6 R.F.L. (5th) 442 (Ont. C.A.) [hereinafter *Tauber*].

[103] The Supreme Court also expressed this sentiment in *Francis*, *supra* note 49.

[104] It appears that the amount of child support has to be quite high before the court will find it inappropriate: see *Tauber*, *supra* note 102 ($17,000); *M.(O.)* v. *K.(A.) Droit de la famille-3148* (2000), 9 R.F.L. (95th) 111 (Que. Sup. Ct.) [hereinafter *M.(O.)*] ($25,567); and *R.* v. *R.* (2000), 10 R.F.L. (5th) 88 (Ont. Sup. Ct.. Just.) [hereinafter *R.*] ($16,398).

[105] *Tauber, supra* note 102.

The judge in *O.M.*[106] had no hesitation in concluding that the table amount ($25,567 per month for three children based on the paying parent's income of $1.9 million) was inappropriate for a variety of reasons: the needs of the children could be met by continuing the $40,000 per year support amount; the parents never had the kind of lifestyle that could result if the table amount were ordered; and the paying parent's substantial increase in income was only significant if the needs of the children were not being met by the initial support amount. The judge felt that any increase in child support beyond that needed to meet the children's needs would be akin to allowing the custodial parent to share in the paying parent's higher income.

An amount *less* than the table amount was ordered or consented to in:

- 16 percent of cases in which the paying parent's income was equal to or greater than $150,000, and
- 9 percent of cases in which the paying parent's income was less than $150,000.

Source: Survey of Child Support Awards database, February 2001.

The judge in *R.* v. *R.*[107] said that the testimony of the paying parent about the family's comfortable and conservative pattern of living prior to separation constituted clear and compelling evidence of the inappropriateness of the table amount (approximately $70,000 per month for four children based on the paying parent's income of $4 million). The paying parent was also able to convince the judge of the unreasonableness of the budgeted expense items.[108] The judge decided that the children's needs could only be assessed in the context of the family's history and situation before the separation. The judge said that the more the income of the paying parent surpassed the $150,000 threshold, the more likely it was that the table amount would be considered inappropriate.

Judges have said that all children of wealthy parents should receive similar treatment, regardless of what the parents chose to do with their money and the lifestyle they choose for themselves.[109] Judges have also pointed out that the custodial parent is entitled to an appropriate level of discretionary spending for the children, one that reflects the paying parent's income.[110]

TRUSTS

The issue of trusts often arises in cases involving section 4. In *Simon*,[111] the judge held that the trial judge erred in increasing the amount that was to be paid into a trust account for the child as neither parent had requested such a variation. The judge went on to say that the discretion of the custodial parent as to how child support is spent should remain unfettered unless the paying parent can establish a valid reason for interfering. In other words, unless there is a good reason to impose a trust, judges should refrain from doing so as the custodial parent is presumed to do his or her best to provide for the children's immediate and future needs.[112]

In *O.M.*,[113] the judge imposed a trust on the parents to ensure the children's privileged lifestyle—especially their educational opportunities—continued long after the paying parent's exceptional earning power had ceased. The judge felt compelled to do so because of the parents' evident inability to properly manage their financial affairs.

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[106] ***M.(O.), supra* note 104.**
[107] ***R., supra* note 104.**
[108] **See also *Hauer* v. *Hauer* (11 April 2001), Ontario 00-BN-5294, [2001] O.J. No. 1520 (Sup. Ct. Just.), where the court held several of the budgeted items to be excessive or non-recurring. In this case, the paying parent rebutted the presumption, as the table amount was far more than the child needed.**
[109] **See *Hollenbach, supra* note 97; *Simon, supra* note 100.**
[110] **See *Marinangeli, supra* note 101; *Tauber, supra* note 102.**
[111] ***Simon, supra* note 100.**
[112] **See also *Marinangeli, supra* note 101, where this presumption was also confirmed.**
[113] ***M.(O.), supra* note 104.**

RECOMMENDATION

No amendments to this section are recommended.

SECTION 5: SPOUSE IN PLACE OF A PARENT

BACKGROUND

Parents and the courts determine whether a child for whom a spouse stands in the place of a parent (a "stepchild") is entitled to child support after separation or divorce by reference to subsection 2(2) of the *Divorce Act*.[114]

Section 5 of the *Federal Child Support Guidelines* currently allows courts to set a child support amount they consider appropriate in these cases. Courts must take into account the amount set out in the Guidelines and the legal duty of any parent other than the step-parent to support the child.[115]

Spouse in Place of a Parent

5. Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.

Most provinces and territories have adopted a similar provision in their own child support guidelines.[116]

APPLICATION

ISSUES

Section 5 applies in cases where support is being claimed from a person who is not the child's biological or adoptive parent. The reference to "any other parent" in the section includes a non-custodial biological or adoptive parent. The section gives the courts discretion to determine the child support amount in these cases. This discretion has resulted in courts across the country adopting various approaches to determining the amount of child support payable by a step-parent. Because of this discretion, it is increasingly difficult for parties to agree on a child support amount.

Other issues have been raised under section 5, such as the duration of the obligation of a step-parent to pay support for a stepchild,[117] as well as the issue of adding a party to an application for child support from a step-parent. Here is what cases so far have determined.

- Courts are not bound by a settlement between two natural parents (where all parents are parties to the application) when determining the support obligation of a step-parent.[118]
- Courts may reduce the table amount owed by the step-parent. They can reduce it by the amount the child's natural parent is required to pay under an order whether or not the step-parent seeks to have the natural parent made a party to the application.[119]

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[114] See the review of subsection 2(2) in the section-by-section review of the *Divorce Act*.

[115] Not all step-parents have a child support obligation. The terms *stepchild*, *stepchildren*, *step-parent*, and *step-parents* are used for ease of reference only. A stepchild is a child for whom a spouse stands in the place of a parent. A step-parent is a spouse who stands in the place of a parent to a child.

[116] However, in Manitoba, the legislation (*Family Maintenance Act*, R.S.M. 1987, c. F20, s. 36 as amended by S.M. 1997, c. 56, s. 4) provides that a step-parent's obligation to pay child support is secondary to the natural or adoptive parents' obligation. In addition, the step-parent generally has to pay support only when the natural or adoptive parents fail to provide reasonably for the children's support, maintenance, or education.

[117] See, for example, *Bevand* v. *Bevand* (20 June 1997), Barrie 97-11366, [1997] O.J. No. 2661 (Ont. Ct. Just. (Gen.Div.)). This case was decided under the Ontario *Family Law Act*, R.S.O. 1990, c. F.3, where the step-parent added the biological father to an application to vary the child support order made against the step-parent.

[118] *Ibid.*

[119] *Simms* v. *Simms* (16 June 1997), Vernon 97-11996, [1997] B.C.J. No. 1553 (S.C.).

- Courts may decline to add a child's biological parent as a party based on evidence that this parent is on welfare. In these cases, the biological parent's financial obligation would be nominal and the primary financial obligation to the child would be that of the step-parent.[120]
- Courts may decline to add a parent as a party but order the step-parent to pay time-limited support. This support would give the natural parents time to adjust to the child becoming the responsibility of his or her natural mother and father.[121]

CASE LAW

Because of the discretion provided by section 5 in determining the child support amount in these cases, courts have used various approaches to calculate the amount of child support a step-parent should pay under both the *Federal Child Support Guidelines* and provincial and territorial child support guidelines. No one approach has been consistently adopted nor has there been any direction provided by appeal courts.

The following are some examples of the varied and numerous approaches that courts have used when applying section 5.

- They have assessed and ordered the full guidelines amount against the step-parent where the natural father played no role in the child's life and paid no support[122] or until they could determine the amount payable by the child's natural or adoptive parent.[123]
- They have added the incomes of all the paying parents, including the income of the step-parent, to get the total income, found the child support table amount for that figure and then divided that amount among the paying parents based on the percentage of the total income earned by each.[124]
- They have apportioned the amount of support due according to the role each parent plays in the life of the child.[125]
- They have treated each paying parent, including the step-parent, individually and applied the guidelines, with the possibility of an excess of support.[126]
- They have determined the amount due from the last paying parent under the guidelines, then subtracted from it any support being paid by a previous paying parent.[127]
- They have considered the child support table amount for each paying parent as well as the means, needs, and circumstances of the parties; the relationship between the step-parent and the child and its length; whether the relationship continues; and the extent to which the child has come to rely on the support of the step-parent.[128]

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[120] *Apthorp* v. *Shearing* (1998), 42 R.F.L. (4th) 287 (Ont. Ct. Just. (Gen. Div.)).

[121] *Irwin* v. *Irwin* (22 September 1997), Cornwall 98-03179, [1997] O.J. No. 3892 (Ont. Ct. Just. (Gen. Div.)) [hereinafter *Irwin*].

[122] See *Clarke* v. *Clarke* (19 October 1998), Vancouver 98-19056, [1998] B.C.J. No. 2370 (S.C.) [hereinafter *Clarke*]; *Kotylak* v. *Kotylak* (21 June 1999), Regina 015727, [1999] S.J. No. 430 (Q.B.); *Oliver* v. *Oliver* (2000), 6 R.F.L. (5th) 389 (B.C.S.C.) (sub nom. O.(T.D.) v. O. (R.G.)).

[123] *Kolada* v. *Kolada* (1999), 241 A.R. 348, 48 R.F.L. (4th) 370 (Q.B.).

[124] This approach was rejected in *Beatty* v. *Beatty* (16 October 1997), Victoria 98-07005, [1997] B.C.J. No. 2269 (C.A.) and *Gordon* v. *Paquette* (1998), 36 R.F.L. (4th) 382 (B.C.S.C.) [hereinafter *Gordon*].

[125] *Dusseault* v. *Dolfo* (26 March 1998), Kamloops 98-11794, [1998] B.C.J. No. 1209 (Prov. Ct. (Fam. Div.)).

[126] *Bell* v. *Michie* (1998), 38 R.F.L. (4th) 199 (Ont. Ct. Just. (Gen. Div.)) [hereinafter *Bell*]; *Gordon*, *supra* note 124; *Wright* v. *Zaver* (2000), 49 O.R. (3d) 629, 7 R.F.L. (5th) 212 (Ont. Sup. Ct. Just.).

[127] *Ruth* v. *Young* (1 August 1997), New Westminster 98-05826, [1997] B.C.J. No. 1848 (S.C.); *Nay* v. *Nay* (24 July 1998), New Westminster D037649 (B.C.S.C.).

[128] *Singh* v. *Singh* (25 September 1997), Kamloops 97-17456, [1997] B.C.J. No. 2195 (S.C.); *White* v. *Rushton* (1998), 37 R.F.L. (4th) 373, [1998] B.C.J. No. 422 (S.C.); *Adler* v. *Jonas* (1998), 48 R.F.L. (4th) 218 (S.C.); *Bell*, *supra* note 126.

- They have determined the support obligation based on the degree of involvement of the step-parent and the natural parent in the life of the child and on the principle that sorting out the extent of the obligation of parents ought not to be to the detriment of the child. In these cases they have rejected the approach that the obligation for child support falls on the natural parent(s) before it falls on a step-parent.[129]
- They have reduced the table amount of support owed by the step-parent by a percentage to reflect the support obligation of the natural parent.[130]
- They have refused to reduce a step-parent's child support obligation unless there is a court order requiring the natural parent to pay child maintenance, as reducing the child support would not be appropriate unless the court was satisfied as to the natural parent's obligation to support the child.[131]
- They have made a time-limited order of one-half the guidelines amount.[132]

The Supreme Court of Canada, in *Chartier* v. *Chartier*,[133] stated that the existence or absence of a post-separation relationship between a child and his or her step-parent should not determine whether a step-parent will be liable to pay support for a step-child. However, such a relationship may be considered in determining the amount and duration of support.[134]

There seems to be confusion between the issue of the liability of a step-parent for child support and the wording of section 5 of the Guidelines. Some courts are not prepared to distinguish between a biological or adoptive parent and a step-parent.[135] However, section 5 of the Guidelines does make this distinction by providing discretion for the courts to determine any other parent's legal duty to support the child.

It is important to note that the Supreme Court of Canada did not refer to section 5 of the Guidelines in *Chartier*. Although the appeal was heard *after* the Guidelines came into force, the case was tried *before* May 1997 and was decided based on the older version of the *Divorce Act*.

AMENDMENT

There have been no amendments to this section since the introduction of the Guidelines in 1997.

RECOMMENDATIONS

The Divorce Act defines a child of the marriage (a child eligible to receive child support) as a child of two spouses or former spouses, including "any child of whom one is the parent and for whom the other stands in the place of a parent." Once it has been established that a spouse stands in the place of a parent, the step-parent's obligations are similar to those of the natural parent. The Federal Child Support Guidelines allow courts to set a child support amount they consider appropriate in these cases. Courts must take into account the amount set out in the Guidelines and the legal duty of any parent other than the step-parent to support the child.

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[129] *Butzelaar, supra* note 80.

[130] *Campbell* v. *Campbell* (1998), 166 Sask. R. 41, 37 R.F.L. (4th) 228 (Q.B.); *Johb* v. *Johb* (1998), 164 Sask. R. 307, 38 R.F.L. (4th) 11 (Q.B.).

[131] *Clarke, supra* note 122.

[132] *Irwin, supra* note 121.

[133] *Chartier* v. *Chartier*, [1999] 1 S.C.R. 242, (1998), 43 R.F.L. (4th) 1 (S.C.C.) [hereinafter *Chartier*].

[134] *Dutrisac* v. *Ulm* (2000), 75 B.C.L.R. (3d) 159, 6 R.F.L. (5th) 132 (C.A.) [hereinafter *Dutrisac*]; *Dumais* v. *Lupul* (2000), 10 R.F.L. (5th) 265 (B.C.S.C.); *Williams* v. *Quigley* (3 November 1999), New Westminster E3318, [1999] B.C.J. No.2605 (S.C.); *Bell, supra* note 126 ; *Greenhalgh* v. *Greenhalgh* (18 January 2000), Nanaimo ED02534, [2000] B.C.S.C. 163 (S.C.), sub nom G.(F.G.) v. G.(M.R.); *Russenberger* v. *Rebagliati* (2000), 5 R.F.L. (5th) 130 (B.C.S.C.).

[135] *Chartier, supra* note 133.

Courts have adopted a variety of approaches to this issue. In light of the resulting inconsistencies some people have argued that the regulations should give judges explicit direction about determining the amount of support for step-children. However, allocating child support among natural parents and step-parents is quite a complex task, which is largely driven by the facts of each case. During consultations, most respondents were concerned that a rigid formula could create unfair results. For these reasons, this section should not be amended.

SECTION 6: MEDICAL AND DENTAL INSURANCE

BACKGROUND

This section was included to permit courts, when ordering child support, to order parents to get or continue medical or dental insurance for the child when either spouse can get such insurance through his or her employer or through some other means at a reasonable rate.

Medical and dental insurance

6. In making a child support order, where medical or dental insurance coverage for the child is available to either spouse through his or her employer or otherwise at a reasonable rate, the court may order that coverage be acquired or continued.

APPLICATION

CASE LAW

This section has been applied consistently and as intended. In many instances, the court simply orders the continuation of insurance coverage already in place.[136] In other instances, the court has ordered the spouse to provide medical and dental insurance coverage for any children.[137] On occasion, when a spouse has cancelled insurance, the court has ordered him or her to re-acquire and maintain it.[138]

Courts have said that section 6 court orders are in addition to the support payable under the Guidelines.[139] Where coverage is continued but the custodial parent is having difficulty getting reimbursed by the spouse holding the insurance, the court may order an additional amount of support to replace the health insurance coverage.[140]

AMENDMENT

This section has not been amended.

RECOMMENDATION

No amendments to this section are recommended.

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[136] See *Blair* v. *Callow* (1998), 41 R.F.L. (4th) 44 (B.C.S.C.) [hereinafter *Blair*]; *Bowering* v. *Bowering* (1998), 171 Nfld. & P.E.I.R. 50 (Nfld. S.C.); *Krislock* v. *Krislock* (1997), 160 Sask. R. 212, 34 R.F.L. (4th) 420 (Q.B.) [hereinafter *Krislock*]; *Khoee-Solomonescu* v. *Solomonescu* (12 November 1997), Ontario 98-09093, [1997] O.J. No. 5396 (Ct. Just. (Gen. Div.)); *Lockman* v. *MacNair* (4 December 1997), Ontario 98-11589, [1997] O.J. No. 5402 (Ct. Just. (Gen. Div.)); *Robski* v. *Robski* (31 October 1997), Halifax 98-05101, [1997] N.S.J. No. 444 (S.C.); *Thompson* v. *Thompson* (12 February 1998), Cranbrook 98-05167, [1998] B.C.J. No. 379 (S.C.) [hereinafter *Thompson*].

[137] See *Bragg* v. *Bragg* (2000), 188 Nfld. & P.E.I.R. 202, 2 R.F.L. (5th) 344 (Nfld. S.C.); *Sanders* v. *Sanders* (1998), 42 R.F.L. (4th) 239 (C.A.) [hereinafter *Sanders*].

[138] See *Jackson* v. *Holloway* (1997), 161 Sask. R. 31, 35 R.F.L. (4th) 272 (Q.B.).

[139] *Hall* v. *Hall* (1997), 35 B.C.L.R. (3d) 311, 30 R.F.L. (4th) 333 (S.C.); *Thompson*, *supra* note 136.

[140] See *Dickinson* v. *Dickinson* (19 October 1998), Barrie 99-02399, [1998] O.J. No. 4815 (Ct. Just. (Gen. Div.)).

SECTION 7: SPECIAL OR EXTRAORDINARY EXPENSES

BACKGROUND

There is a presumption in section 3 of the *Federal Child Support Guidelines* that courts must order the amount prescribed in the applicable child support tables when making child support orders.[141] The child support tables are based on a formula.[142] The application of this formula, by way of the tables, helps parents, lawyers, and judges set fair child support amounts in a way that is consistent and predictable.

Special or extraordinary expenses

7.(1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

(a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;

(b) that portion of the medical and dental insurance premiums attributable to the child;

(c) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

(e) expenses for post-secondary education; and

(f) extraordinary expenses for extracurricular activities.

SOR/2000-337, s. 1(1), (2), (3)
SOR/2000-337, s. 1

While the table amounts reflect average expenditures on children, some kinds of expenses do not lend themselves to averages. Section 7 of the Guidelines provides flexibility to adjust the child support amount to account for these various expenses. Six categories of child-related expenses can be included in the child support amount if they are reasonable and necessary in light of the needs of the child, of the means of the parents and the child, and of any family spending pattern established before separation. Although this discretion may make the Guidelines more difficult to apply and result in less consistency in child support amounts, the discretion creates a balance between consistent application and consideration of particular circumstances.

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[141] The presumption applies unless otherwise set out in the Guidelines. See subsection 3(1) of the Guidelines.

[142] See Department of Justice, *Formula for the Table of Amounts Contained in the* Federal Child Support Guidelines*: A Technical Report* (Ottawa: Department of Justice, CSR-1997-1E, 1997).

Regarding the amount of the expense payable, subsection 7(2) sets out the guiding principle that all special or extraordinary expenses be shared by the parties in proportion to their respective incomes, less the contribution from the child, if any. Subsection 7(2) supports the objective set out in paragraph 1(a) of the Guidelines, which states that children should continue to benefit from the means of both spouses after separation.

Subsection 7(3) ensures that any amounts that reduce the sum of the special expenses should be taken into account to ensure that parents are contributing toward the net amount of the expense. To ensure that there is no overpayment, one must determine subsidies, benefits, tax deductions, credits, and so forth.

APPLICATION

Section 7 provides parents and the courts with the discretion to change the basic child support amount. Inevitably, this discretion can lead to disagreement, so there is ample case law under section 7. However, since 1997, the courts have resolved many of the disputed issues. For example, in interpreting subsection 7(1), courts have confirmed that either parent can request a special expense when applying for child support or for a variation of child support.[143] Still unresolved is whether student loans are part of the "means" of the child and how to interpret the term *extraordinary*.

Sharing of expenses

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

Subsidies, tax deductions, etc.

(3) In determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

SUBSECTION 7(1)

ISSUES

When deciding whether to include special expenses in a child support order, the court must address the means of both the parents and the child. The courts have set out the factors to be taken into account when doing so.

- 32.3 percent of cases included one or more section 7 expenses.
- Child care expenses were specified in 12.4 percent of all cases.
- Medical or dental insurance or premiums were specified in 10.8 percent of all cases.
- Extracurricular activities were specified in 10.5 percent of all cases.
- Health-related expenses were specified in 10 percent of all cases.
- Post-secondary education was specified in 6.6 percent of all cases.
- Primary or secondary education was specified in 6.2 percent of all cases.

Source: Survey of Child Support Awards database, October 1998–February 2001.

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[143] ***Middleton* v. *MacPherson* (1997), 204 A.R. 37, 29 R.F.L. (4th) 334 (Q.B.) [hereinafter *Middleton* cited to A.R.].**

CASE LAW

Any section 7 expense must satisfy two discretionary tests: the necessity of the expense, given the best interests of the child, and the reasonableness of the expense, given the means of both the parents and the child and given the spending pattern of the family before separation.[144]

Expenses listed in paragraphs (d) and (f) must be "extraordinary" to be considered as additional expenses. In the case of extraordinary expenses, the necessity and reasonableness analysis is not done until after the expense in question has been found to be extraordinary.[145]

The reasonableness test is based on the means of the spouses and the child and on the family's pre-separation spending pattern. It has been accepted in many cases that reasonableness involves examining the full means of the parties.[146] This requires assessing their separate status and other factors including income distribution, capital, access costs, third party resources that affect their ability to pay, other spousal or child support obligations, and spousal support received.

The means of the child is most frequently an issue in cases where the child is in his or her late teens and capable of earning employment income. In *Di Fabio* v. *Di Fabio*,[147] in assessing extraordinary expenses under paragraphs (d) and (f), when assessing the means of the children, the judge considered benefits payable to the children under the *Canada Pension Plan Act*,[148] child maintenance received from the parents, and income from employment. The judge held that it was reasonable that a portion of the above amounts be applied against the costs of the extraordinary expenses.

Most courts share the view that a child should not be required to contribute every dollar from his or her employment to the payment of expenses falling under section 7, as a child should be given the opportunity "to experience some personal benefit from the fruits of his or her labours."[149]

This issue becomes particularly relevant under paragraph (e) concerning expenses for post-secondary education. Children are expected to contribute to their post-secondary education expenses and this approach is reflected in the judgments.[150] Whether student loans should be considered and how much the child is expected to work are matters of some debate. It was held in *Carnell* v. *Carnell*[151] that it is appropriate for the child to contribute to post-secondary education expenses, whether through student loans or employment earnings. Taking an opposite approach, the court in *Wesemann* v. *Wesemann*[152] held that although children must make a reasonable contribution, not all of their income must be applied to their education, nor should they be required to work during the school year. Furthermore, the child does not have to get a student loan merely because one may be available, as a loan simply delays rather than defrays a student's expenses.

[144] See *Raftus* v. *Raftus* (1998), 166 N.S.R. (2d) 179, 37 R.F.L. (4th) 59 (C.A.) [hereinafter *Raftus* cited to N.S.R.]; *Andries* v. *Andries* (1998) 126 Man. R. (2d) 189, 36 R.F.L. (4th) 175 (C.A.) [hereinafter *Andries* cited to Man. R.].

[145] *McLaughlin* v. *McLaughlin* (1998), 57 B.C.L.R. (3d) 186, 44 R.F.L. (4th) 148 (C.A.) [hereinafter *McLaughlin* cited to B.C.L.R.].

[146] See *McLaughlin*, *ibid.*; *Raftus*, *supra* note 144; *Bland* v. *Bland* (1999), 239 A.R. 301, 48 R.F.L. (4th) 250 (Q.B.).

[147] *Di Fabio* v. *Di Fabio* (5 January 1999), Vancouver 99-03970, [1999] B.C.J. No. 9 (S.C.) [hereinafter *Di Fabio*].

[148] R.S.C. 1985, c. C-8.

[149] *Glen* v. *Glen* (3 December 1997), Victoria 98-09181, [1997] B.C.J. No. 2806 at para. 14 (B.S. S.C.) [hereinafter *Glen*] ; *Risen* v. *Risen* (7 August 1998), Ontario 98-FA-6614, [1998] O.J. No. 3184 (Ct. Just.) [hereinafter *Risen*]; *Di Fabio*, *supra* note 147; *Wesemann* v. *Wesemann* (1999), 49 (4th) 435 (B.C.S.C.) [hereinafter *Wesemann*].

[150] See *Budyk* v. *Sol* (1998), 126 Man. R. (2d) 305, 40 R.F.L. (4th) 348 (C.A.).

[151] *Carnell* v. *Carnell* (1998), 165 Sask. R. 305, 37 R.F.L. (4th) 392 (Q.B.).

[152] *Wesemann*, *supra* note 149.

The issue also arises with children over the age of majority, primarily with respect to any post-secondary school expenses. In *Risen*,[153] the judge held that both income and student loans should be included when calculating a child's means. In *Glen*,[154] the judge held that the child was financially capable of paying all of her post-secondary and health-related expenses and having money remaining; the judge did not order section 7 expenses. In *Morissette* v. *Ball*,[155] the judge ended support after the child's first year of a post-graduate degree, as she was spending most of her employment income on extravagant expenses. The judge held that she had no right to expect her parents to support her educational endeavours while she failed to contribute to her future in any meaningful way.

An inheritance received by a child has also been held to constitute means. In *Griffiths* v. *Griffiths*,[156] the child was ordered to pay for his educational expenses using inheritance money from his grandmother.

PARAGRAPH 7(1)(A): CHILD CARE EXPENSES

ISSUES

The application of paragraph 7(1)(a) is relatively straightforward.

CASE LAW

Overall, the courts seem willing to almost automatically order child care expenses under paragraph 7(1)(a). Furthermore, the courts seem particularly sensitive to the custodial parent's need to re-enter the workforce. This approach is partially justified because the cost to the paying parent will decrease as the custodial parent becomes gainfully employment.

For example, in *Wedsworth* v. *Wedsworth*,[157] the Nova Scotia Court of Appeal overturned the lower court's decision and restored the payment of day care expenses for six months. The court felt that both parties would benefit in the long term if the custodial parent could complete her retraining and find suitable employment.

Similarly, in *Van Deventer* v. *Van Deventer*,[158] the court reasoned that day care was necessary as the custodial parent now had to work full time and could not be the full-time caregiver that she had been during the marriage. In *Rebak* v. *Rebak*,[159] the court canvassed many factors before deciding that the trial judge had erred in not ordering child care expenses. One of the factors was that during the marriage the family had employed a nanny.

Appeal courts seem content to let trial judges use their discretion to determine special child care expenses, even when the trial judges do not explain how they reached a particular figure.[160] These payments are also given priority over various other debts incurred by the paying parent.[161]

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[153] *Risen*, *supra* note 149. This case dealt with subsection 3(2) rather than subsection 7(1); however, after assessing the "condition, means, needs and other circumstances of the child," the judge focused exclusively on "means" of the child, so the judgment is relevant to the above analysis. See also *Hughes* v. *Biain* (1998), 39 R.F.L. (4th) 327 (Ont. Ct. Just.), where it was held (as in *Di Fabio*, *supra* note 147) that Canada Pension Plan benefits should not play a role in determining the paying parent's obligations but could be assessed when considering the child's means under section 7.

[154] *Supra* note 149.

[155] *Morissette* v. *Ball* (7 January 2000), Ontario 4326/99, [2000] O.J. No. 73 (Sup. Ct. Just.), aff'd (9 November 2000), Toronto C33633, [2000] O.J. No. 4307 (C.A.).

[156] *Griffiths* v. *Griffiths* (25 August 1998), Vancouver D076027, [1998] B.C.J. No. 2000 (S.C.).

[157] *Wedsworth* v. *Wedsworth* (2000) 188 N.S.R. (2d) 22, 12 R.F.L. (5th) 232 (N.S.C.A.) [hereinafter *Wedsworth* cited to N.S.R.].

[158] *Van Deventer* v. *Van Deventer* (2000) 132 B.C.A.C. 186, 3 R.F.L. (5th) 300 (C.A.) [hereinafter *Van Deventer* cited to B.C.A.C.].

[159] *Rebak* v. *Rebak* (1998) 61 B.C.L.R. (3d) 393, 43 R.F.L. (4th) 124 (C.A.).

[160] See *Young* v. *Young* (2000), 225 N.B.R. (2d) 272, 7 R.F.L. (5th) 228 (C.A.).

[161] See *Wedsworth*, *supra* note 157, where child care expenses were given priority over mortgage arrears; *Van Deventer*, *supra* note 158, where child care expenses were given priority over family debts in general.

PARAGRAPH 7(1)(B): MEDICAL AND DENTAL INSURANCE PREMIUMS

This paragraph allows one parent to ask the other parent to share some of the child's medical and dental premiums. It complements section 6 of the Guidelines, which lets a court order a spouse to get or continue medical or dental insurance coverage for a child.

ISSUES

There are no significant issues relating to this paragraph.

CASE LAW

The spouse carrying the insurance has to show what portion of the premium is directly attributable to the child.[162] The court will not accept a mere guess as to this amount.

Courts have held that it is appropriate to share insurance premium payments if those payments are higher because there are children.[163] In other words, apportionment is not appropriate if it doesn't cost the insured person anything extra to insure the child.

A review of the cases shows that, when interpreting this paragraph, the courts have properly applied the tests of necessity and reasonableness and that they have considered the means of the spouses, the best interests of the children, and the spending pattern of the family before separation.[164]

PARAGRAPH 7(1)(C): HEALTH-RELATED EXPENSES

Under this paragraph, one parent can ask the other parent to share health-related expenses that are at least $100 a year more than those reimbursed by insurance. Valid health-related expenses may include hearing aids, glasses, contact lenses, professional counselling, speech therapy, and prescription drugs.

ISSUES

There are no significant issues related to this paragraph.

CASE LAW

The paragraph is not a list of all valid expenses. Courts have, for example, accepted claims for non-prescriptive medications[165] and they have liberally and broadly interpreted the phrase *health-related*.[166] Such cases are decided by the relationship between the child's health and the associated expense.

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[162] See *Krislock*, *supra* note 136; *Yaremchuk* v. *Yaremchuk*, (1998) 218 A.R. 153, 38 R.F.L. (4th) 312 (Alb. Q.B.) [hereinafter *Yaremchuk*]; *Tougher* v. *Tougher* (20 March 1998), Edmonton 98-12055, [1998] A.J. No. 294 (Q.B.).

[163] *Middleton*, *supra* note 143.

[164] See *White* v. *Rushton* (1998), 37 R.F.L. (4th) 373 (B.C.S.C.); *Dion* v. *Dion* (20 March 1998), New Westminster 98-15407, [1998] B.C.J. No. 648 (S.C.).

[165] *Miceli* v. *Miceli* (29 December 1998), Ontario 99-03035, (1998) 83 O.T.C. 297, [1998] O.J. No. 5460 (Ont. Ct. Just.) [hereinafter *Miceli*].

[166] See *Miceli*, *ibid.*, where expenses for alternative medical remedies were accepted; *Welsh*, *supra*, note 64, where the court ordered the parents to share the cost of transportation to and from school for their physically challenged daughter; *Jarbeau* v. *Pelletier* (22 July

PARAGRAPH 7(1)(D): EXTRAORDINARY EXPENSES FOR PRIMARY OR SECONDARY SCHOOL EDUCATION

This paragraph enables one parent to ask the other parent to share extraordinary expenses for primary or secondary school education or for other educational programs that address the child's individual needs.

ISSUES

The circumstances under which a court can order sharing of educational expenses remain controversial, particularly regarding the meaning of the term *extraordinary* which is addressed under the analysis of paragraph (f) below.

CASE LAW

In *Andrews* v. *Andrews*,[167] the court held that an order under paragraph 7(1)(d) must satisfy three criteria: the education expense must be extraordinary, the order must consider whether the expense is necessary given the child's best interests, and the order must take into account the reasonableness of the expense given the means of the parents and the spending patterns of the family when they all lived together. In this case, the court found that the family had specific educational expenses not covered by the basic table amount.

From a review of the cases, it seems that the courts prefer the status quo that existed when the family lived together.[168] For example, in *Van Deventer*, the court remarked that the father had been content to have his son attend private school while the parties were together and he was unable to point to any change in circumstances indicating that this expense had become unreasonable or unnecessary.

However, the courts are willing to examine a number of other factors, such as the educational history of the parents (including, for example, whether the parent attended private school), the children's private pre-schooling, whether the child's talent has developed, and the ability of the non-custodial parent to pay.[169]

In *Wait* v. *Wait*,[170] the custodial parent was seeking support for the tuition for a special pre-school program. The court held that as there is no question that the custodial parent must work, the tuition must fall under paragraph (a) as child care expenses. Given the means of the spouses and the lack of evidence that the child had needs that differed from those of normal children, the pre-school tuition could not fall under paragraph (d).

The appeal courts defer to trial judges' analysis of the evidence and determination of what is in the best interests of the child.[171] This is the case even when the trial judge does not refer to the principles in section 7.[172]

1998), North Bay 98-13775, [1998] O.J. No. 3029 (Ont. Ct. Just.), where the order for expenses included those incurred while travelling to a major urban hospital for treatment.

[167] *Andrews* v. *Andrews* (1999) 45 O.R. (3d) 577, 50 R.F.L. (4th) 1 (C.A.).

[168] *Van Deventer, supra* note 158; *Green* v. *Green* (2000), 75 B.C.L.R. (3d) 306, 6 R.F.L. (5th) 197 (C.A.) [hereinafter *Green* cited to B.C.L.R.]; *Colizza* v. *Arnot* (2000), 6 R.F.L. (5th) 100 (Man. C.A.) [hereafter *Colizza*]; *Andrews*, *ibid.*

[169] *Cochrane* v. *Zarins* (1998), 36 R.F.L. (4th) 434 (B.C.C.A.).

[170] *Wait* v. *Wait* (2000), 140 B.C.A.C. 81, 7 R.F.L. (5th) 446 (C.A.).

[171] *Green*, *supra* note 168; *Colizza*, *supra* note 168.

[172] *Green*, *supra* note 168.

PARAGRAPH 7(1)(E): EXPENSES FOR POST-SECONDARY EDUCATION

This paragraph allows the court to order the sharing of expenses related to the child's post-secondary education.

ISSUES

The basic issue is simply to determine under what circumstances this section is being applied.

CASE LAW

Generally, the courts seem willing to make orders under this paragraph, subject to the tests of necessity and reasonableness. It has been held that, "[g]enerally speaking, academically qualified children, with reasonable expectations of undertaking post-secondary education, should receive support to permit their completion of an undergraduate university degree or college diploma."[173]

PARAGRAPH 7(1)(F): EXTRAORDINARY EXPENSES FOR EXTRACURRICULAR ACTIVITIES

ISSUES

Presently, there is judicial controversy over how to determine whether an expense for an extracurricular activity is *extraordinary*. There are two divergent schools of thought, one applying an objective test[174] and the other applying a subjective test.[175] Some people have intimated that this controversy may be fuelled by the lack of direction in the Guidelines themselves.[176] The leading cases to date are *Raftus* [177] and *McLaughlin*.[178]

All the courts agree that the use of the word *extraordinary* in the section implies that usual or ordinary expenses are included in the table amounts. The difficulty arises in differentiating between ordinary and extraordinary expenses for extracurricular activities, since further support is justified for the latter. Similarly, the courts agree that *extraordinary* applies to the expense itself and not the associated activity.

CASE LAW

In *Raftus*,[179] the Nova Scotia Court of Appeal had to decide whether a non-custodial parent was required to contribute to his children's extracurricular activities, such as swimming, soccer, and tae kwon do, which came to another $2,259 annually. The majority applied an objective test, presuming that the prescribed tables in the Guidelines already provided for ordinary extracurricular expenses. The extraordinary nature of the expenses must be determined not in light of parental income, but by the nature of the activities and the nature of the expenses.

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[173] *Holizki* v. *Reeves* (1997), 161 Sask. R. 76, 34 R.F.L. (4th) 414 at para. 15 (Q.B.).

[174] See *Andries*, *supra* note 144; *Raftus*, *supra* note 144.

[175] See *McLaughlin*, *supra* note 145; *Kofoed*, *supra* note 42 (18); minority opinion in *Raftus*, *supra* note 144; *Sanders*, *supra* note 137

[176] See, for example, *McLaughlin*, *supra* note 145.

[177] *Raftus*, *supra* note 144.

[178] *McLaughlin*, *supra* note 145.

[179] *Raftus*, *supra* note 144.

This objective approach was also adopted in *Andries*,[180] where the court held that an expense for an extracurricular activity is extraordinary only when it is out of proportion to the usual costs of that particular activity. The court felt that this approach would be sensitive to regional differences within a province. As in *Raftus*, whether an expense was extraordinary had nothing to do with the parents' incomes.

The minority judgment in *Raftus* applied a subjective test, based on the parents' joint incomes. In *McLaughlin*,[181] the British Columbia Court of Appeal followed the minority judgment in *Raftus*. It assessed the combined incomes of both spouses to decide whether the expense was extraordinary under paragraph 7(1)(f). Further, the court said that it should also consider the nature and amount of the individual expenses, the nature and the number of the activities, any special needs or talents of the children, and the overall cost of the activities. The court reasoned that justice done would outweigh any loss of certainty of result. This test has been applied in many other cases.[182]

Once expenses for extracurricular activities are found to be extraordinary, the court must then determine whether the expenses are necessary in relation to the child's best interests and reasonable, having regard to the means of the spouses and those of the child, and to the family's spending pattern prior to separation. This process would be the same for "extraordinary" educational expenses under s. 7(1)(d). Finally, while other expenses included under subsection 7(1) need not be extraordinary, they must also meet the tests of necessity and reasonableness.

Use of Provisions on Extraordinary Expenses for Education and Extraordinary Extracurricular Activities, by Province*

Province/territory		Section 7 cases		Education (1)		Extracurricular	
	All n (2)	n	%	n	% of all cases	n	% of all cases
Nova Scotia	1,272	259	20.4	18	1.4	63	5.0
New Brunswick	757	190	25.1	26	3.4	66	8.7
Ontario	4,237	1,731	40.9	366	8.6	593	14.0
Manitoba	1,700	477	28.1	50	2.9	51	3.0
Saskatchewan	864	291	33.7	18	2.1	90	10.4
Alberta	8,049	3,455	42.9	700	8.7	1,212	15.1
British Columbia	610	174	28.5	32	5.2	46	7.5
Total	17,489 (3)						

(1) Primary/secondary school expenses.

(2) To be included in this analysis, cases had to have information on paying parent income.

Cases with incomes over $150,000 have been excluded.

Provinces with fewer than 100 cases have been excluded.

(3) There are another 5,079 cases where there is no information on special expenses.

*This table excludes cases in which it was known that special or extraordinary expenses were awarded, but information was missing on the award of particular types of expenses.

Source: Survey of Child Support Awards database, February 2001.

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[180] *Andries, supra* note 144.

[181] *McLaughlin, supra* note 145.

[182] *Rolls* v. *Rolls*, (14 January 2000), Calgary 98-17905, [2000] A.J. No. 28 (C.A.) *Brown* v. *Simon* (2000), 134 B.C.A.C. 318, 4 R.F.L. (5th) 50 (C.A.); *Schoenroth* v. *Ryba* (1999), 180 Sask. R. 121, 47 R.F.L. (4th) 381 (C.A.); *Kofoed, supra* note 42; *Sanders, supra* note 137.

SUBSECTION 7(2)SHARING OF THE EXPENSE

ISSUE

There are no significant issues relating to this subsection.

CASE LAW

Although the courts have exercised their discretion under this subsection, in the majority of cases, the special or extraordinary expenses have been shared proportionally.[183] Courts have not applied the guiding principle when one parent lived in poverty;[184] when the recipient had a low income and had raised two-thirds of the cost of the special expenses;[185] and when there was inadequate financial disclosure.[186]

SUBSECTION 7(3): SUBSIDIES, TAX DEDUCTIONS, ETC.

ISSUE

There are no significant issues relating to this subsection.

CASE LAW

In *Kelly* v. *Kelly*,[187] the court confirmed that in calculating net special expenses, the deduction of benefits includes not only the income tax deduction but also the part of the increased federal and provincial tax credits and GST credit payable to the recipient parent. This is so because claiming a deduction for certain special expenses lowers the parent's income.

AMENDMENTS

Since 1997, section 7 has been amended twice. These amendments came into effect on November 1, 2000. They clarified legislative intent and were meant to reduce litigation.[188]

As can be seen by the wording of subsection 7(1), the parents, the court, or both can now estimate the amount of the expenses if they cannot determine the exact amount at the time of the order. This should make the legal process more efficient. It should also reduce legal costs for parents who want an order for special expenses but who cannot immediately determine the amount. Paragraph 7(1)(c) was also amended to remove the reference to "per illness or event"; sometimes children have several illnesses or health-related events that cost less than $100 each, but which total more than $100 for the year. Paragraph 7(1)(d) was also amended to add the word "other" to make it consistent with the French wording, which is the correct version. No amendment was made to the French section.

The French version was amended to remove words that were inadvertently inserted when the first set of November 1, 2000 amendments were made.

[183] *Middleton*, *supra* note 143.

[184] *R.(E.K.)* v. *W.(G.A.)* (1997), 32 R.F.L. (4th) 202; additional reasons at (1998), 124 Man. R. (2d) 258 (Q.B.).

[185] *Kissmann* v. *Kissmann* (28 February 2001), Ontario D14 760196, [2001] O.J. No. 770 (Sup. Ct. Just.).

[186] *Ebrahim* v. *Ebrahim* (15 September 1997), Vancouver 98-03439, [1997] B.C.J. No. 2039 (S.C.).

[187] *Kelly* v. *Kelly* (1998), 40 R.F.L. (4th) 68 (Alta. Q.B.).

[188] *SOR/2000-337, s. 1(1), (2), (3)*
SOR/2000-337, s. 1

RECOMMENDATIONS

The term extraordinary should be defined to better guide parents and the court and to improve consistency across the country among families in similar circumstances.

The term extraordinary has been interpreted differently across the country. Some courts of appeal have adopted a subjective approach and others an objective approach. This has created some confusion and inconsistency resulting in calls for an explanation of extraordinary. Also, research has shown that in the provinces that have adopted an objective approach, such as Manitoba and Nova Scotia, the number of extraordinary expenses in child support orders is lower than in jurisdictions that have adopted a subjective approach, such as British Columbia and Ontario.[189]

Parents and courts will be directed to examine whether the expense is extraordinary in relation to the income of the parent asking for and paying for the expense. If this test alone is not applicable, parents and the court will be directed to consider other factors in addition to income, such as:

- ***the number and nature of the programs and activities;***
- ***the overall cost of the programs and activities;***
- ***any special needs and talents of the child; and***
- ***any other similar factor the court considers relevant.***

The proposed approach is consistent with the original intent of the section and with the interpretation adopted by several appeal courts.

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[189] **Survey of Child Support Awards database, October 1998–February 2001.**

SECTION 8: SPLIT CUSTODY

BACKGROUND

In a split custody arrangement, one or more children reside with each spouse. Unlike shared custody, children in split custody situations do not reside with each parent at least 40 percent of the time. When parents have split custody of their children, the child support order is the difference between the amount that each parent would otherwise pay the other parent if a child support order were sought against each of them. This method is popularly known as the "set-off" method for determining support: each parent's child support obligation is set off against the child support obligation of the other parent.

Split custody

8. Where each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

In most cases, one determines the difference between the amount that each parent would otherwise be required to pay by using the child support tables for the number of children residing with the other parent. One then adds a proportionate share of any special or extraordinary expenses under section 7 of the Guidelines, if applicable.[190]

When it comes to determining child support under section 8, the court has to use the set-off method. Of course, the Guidelines do allow for discretion in calculating the two amounts, such as in cases involving incomes over $150,000, involving adult children, or involving step-parents. In addition, after using section 8 to find the amounts, one is allowed to depart from those amounts, within the overall structure of the Guidelines, on the grounds of undue hardship or by way of special provisions in an order or agreement.

The Federal-Provincial-Territorial Family Law Committee recommended the set-off method in split custody situations. In its 1995 report,[191] the Committee said each child should benefit from an individual support determination. This approach accounts for one parent having higher income than the other and for parents having different numbers of children in their care.

APPLICATION

ISSUES

COMPLEX CUSTODY ARRANGEMENTS

When family situations involve both split and shared custody, it is hard to describe the custodial arrangement and to determine the amount of child support. For example, if each parent has custody of one child and a third child spends equal time with each parent, should support be based on section 9, dealing with shared custody, or on section 8, dealing with split custody?

[190] For a detailed review of special or extraordinary expenses, see "Section 7: Special or Extraordinary Expenses."

[191] Federal-Provincial-Territorial Family Law Committee, *Report and Recommendations on Child Support* (Ottawa: Department of Justice, January 1995), p. 37.

DISCRETION NOT TO EMPLOY SET-OFF

Because under section 8 there is no discretion to depart from the set-off method, courts have generally chosen one of two possible methods to determine a different amount. First, a court may assess a claim for undue hardship under section 10. Second, subsection 15.1(5) of the *Divorce Act* permits courts to order a different amount when special provisions have otherwise been made for the benefit of a child and the guideline amount would therefore be inequitable (a similar provision is applicable for variation applications, subsection 17(6.2)).

CASE LAW

The vast majority of courts have interpreted section 8 of the Guidelines as intended by setting off the amounts owed by each spouse for the children in the other spouse's custody.[192] In many cases, section 7 special or extraordinary expenses are then apportioned between the parties.[193]

COMPLEX CUSTODY ARRANGEMENTS

There are few cases involving complex custody arrangements. As sections 8 and 9 are mutually exclusive, the courts must apply the relevant section, based on the particular circumstances before the court.[194] A review of the case law suggests that the courts are very adept at applying the appropriate section. Overall, it is in the best interests of the children to let courts sort out any complex custody situations.

For example, in *Herbert-Jardine* v. *Jardine*,[195] one child (T) lived primarily with the father and the other child (R) lived equally with the father and the mother. The court used the shared custody provision (section 9) because the mother was seeking child support from the father but R spent equal time with both parents. However, the split custody provision (section 8) was relevant to T's situation because his primary residence was with the father and the father was both entitled to and liable for child support with respect to R. The court assessed the support payable by both parties under the relevant section for each child and arrived at a net amount of support to be paid.

DISCRETION NOT TO ORDER SET-OFF

In *MacLeod* v. *Druhan*,[196] the judge recommended that the section 8 set-off amounts be adjusted because a straight application of section 8 would constitute undue hardship for the mother. However, although the judge referred to undue hardship, the decision did not analyze undue hardship itself.

In *Farmer* v. *Conway*,[197] the court held that it was appropriate to consider the standards of living of the two households when assessing the effect of a section 8 set-off. In this case, the mother's common-law husband contributed financially, which raised the standard of living in the household above that of the father's household. As such, the father's child support payment was reduced. Again, although undue hardship was cited as the reason for the reduction, no mention was made of section 10. These sorts of cases were once prevalent in Nova Scotia, but have become less so in recent years.

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[192] See, for example, *Albright* v. *Albright* (9 June 1998), Victoria 98-15157, [1998] B.C.J. No. 1424 (S.C.) [hereinafter *Albright*]; *Duguay* v. *Thompson-Duguay* (2000), 7 R.F.L. (5th) 301 (Ont. Sup. Ct. Just.) [hereinafter *Duguay*]; *Forbes* v. *Forbes* (6 May 1998), New Westminster 98-12550, [1998] B.C.J. No. 1180 (S.C.) [hereinafter *Forbes*]; *Holtby* v. *Holtby* (1997), 30 R.F.L. (4th) 70 (Ont. Ct. Just. (Gen. Div.)) [hereinafter *Holtby*]; *Ninham* v. *Ninham* (1997), 29 R.F.L. (4th) 41 (Ont. Ct. Just. (Gen. Div.)); *Simms* v. *Simms* (16 June 1997), Vernon 97-11996, [1997] B.C.J. No. 1553 (S.C.); *Westcott* v. *Westcott* (22 July 1997), Barrie 97-14219, [1997] O.J. No. 3060 (Ct. Just. (Gen. Div.)); *Vanderstoop* v. *Vanderstoop* (21 January 1998), Calgary 98-11547, [1998] A.J. No. 100 (Q.B.) [hereinafter *Vanderstoop*].

[193] See, for example, *Albright*, *ibid.*; *Forbes*, *ibid.*; *Harrison* v. *Harrison* (18 September 1998), Vancouver 99-05376, [1998] B.C.J No. 3090 (S.C.); *Vanderstoop*, *ibid.*.

[194] See, for example, *Duguay*, *supra* note 192; *Blair* v. *Callow*, *supra*, note 136.

[195] *Herbert-Jardine* v. *Jardine* (1997), 39 R.F.L. (4th) 13 (Ont. Ct. Just. (Gen. Div.)).

[196] *MacLeod* v. *Druhan* (1997), 165 N.S.R. (2d) 70, 34 R.F.L. (4th) 206 (Fam. Ct.).

[197] *Farmer* v. *Conway* (1998), 175 N.S.R. (2d) 143 (S.C.).

Often, the courts have used their discretion under subsection 15.1(5) of the *Divorce Act* to order an amount different from the set-off amount determined under section 8 of the Guidelines.

In *Dudka* v. *Dudka*,[198] the judge exercised his discretion under subsection 15.1(5), deciding that a straight set-off would be inequitable. He ordered the mother not to pay the table amount of $428 for the two children living with the father. However, the father had to pay the table amount of $201 support for the one child living with the mother; the father had repaired the mother's house and thereby increased her mortgage.

In *Holtby*,[199] the judge increased the set-off amount by $49 per month to the wife because of the interest consequences when a property equalization payment was postponed. The judge felt the straight set-off amount produced an inequitable result.

In *Hutchings* v. *Hutchings*,[200] the British Columbia Court of Appeal discharged the mother's obligation to pay child support under section 8 of the Guidelines for children in the father's care, because she had previously paid a lump sum for child maintenance. The father was ordered to pay the table amount to the mother for support of the child in her care.

AMENDMENT

There have been no amendments to section 8 of the *Federal Child Support Guidelines*.

RECOMMENDATION

The Department of Justice recommends no amendments to section 8.

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[198] *Dudka* v. *Dudka* (16 December 1997), Halifax 98-09564, [1997] N.S.J. No. 526 (S.C.).
[199] *Holtby, supra* note 192.
[200] *Hutchings* v. *Hutchings* (1999), 72 B.C.L.R. (3d) 73, 4 R.F.L. (5th) 79 (C.A.).

SECTION 9: SHARED CUSTODY

BACKGROUND

This section sets out a special rule for determining the amount of child support in shared custody situations. If family arrangements meet the description of shared custody, this section is used to calculate child support.

Shared Custody

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 percent of the time over the course of a year, the amount of the child support order must be determined by taking into account:
    (a) the amounts set out in the applicable tables for each of the spouses;
    (b) the increased costs of shared custody arrangements; and
    (c) the condition, means, needs and other circumstances of each spouse and of any child for whom support is sought.

When parents share custody, each directly pays part of the child's expenses. However, the overall parenting costs are generally higher because some fixed expenses will be duplicated, such as housing, transportation, and even clothing. Every dollar spent by one parent does not necessarily result in a dollar saved by the other parent. The details can vary greatly depending on the exact nature of the arrangements.

Regardless of the wording of a custody and access arrangement, the amount of time each parent is responsible for the children is the only factor used to determine whether this section applies. Thus, parents who have a joint custody order or agreement may not meet the shared custody threshold.

The draft *Federal Child Support Guidelines* initially proposed that parents could meet the shared custody threshold if they shared substantially equal physical custody over the course of a year. Ultimately, the *Federal Child Support Guidelines* adopted the 40-percent time threshold as recommended by both the Federal-Provincial-Territorial Family Law Committee and the Standing Senate Committee on Social Affairs Science and Technology, which reviewed Bill C-41.

APPLICATION

Most people agree that this section has not made it easier to determine child support in shared custody situations. A review of the case law suggests that the 40-percent time threshold has been controversial and that no consensus has emerged on how to calculate support in shared custody situations. There is also concern that courts may not be considering all three listed factors when determining the amount of support. Because of this lack of certainty, parents may have difficulty resolving this issue.

THE 40-PERCENT TIME THRESHOLD

ISSUES

Critics have argued that the time threshold is not appropriate and that it is hard to tell whether 40 percent has been reached. The Guidelines do not help parties interpret the 40-percent time threshold. No consistent approach to calculating time under this section has emerged from the cases.

The shared custody rule was *not* intended to change the long-standing legal principle that child support and custody are unique issues that parents should deal with separately. Given this, the time threshold approach has been criticized because it links financial interests and time spent with the children. The parties may each have financial incentive to use access as a negotiating point. Receiving parents may benefit financially by negotiating less access and paying parents may have a financial incentive to increase access.

In some cases these incentives might have made it harder to reach access agreements and might have prolonged litigation. Some parents have strictly focused on access details during difficult litigation, even keeping computer printouts of contacts with their children. This has been referred to as "stopwatch" litigation. In some cases, paying parents have taken every access opportunity during the legal proceedings, thereby qualifying for shared custody and a reduced order, only to decrease their access afterward, leaving the receiving parent with too little support and the prospect of further court proceedings to correct it. In other cases, receiving parents have resisted further access to avoid shared custody. These incentives directly undermine the stated Guidelines objectives of reducing conflict and encouraging settlement.

Many people fault the threshold rule for being too arbitrary and for creating a "cliff effect" at the 40-percent threshold. The cliff effect describes the potentially different treatment for a paying spouse who sees the children 39 percent of the time and one who sees them 41 percent of the time.

CASE LAW

Although there has been much discussion in the case law regarding the appropriate application of the 40-percent threshold rule,[201] emerging consistency in the case law holds that the receiving parent starts with 100 percent of the time, including those "on-call" hours when the child is not directly in the parent's care, such as while at school or sleeping. The access parent's time with the child is subtracted from 100 percent. In other words, in order to meet the threshold, the paying parent must exercise access or physical custody 40 percent of the total time.[202] This is consistent with the intended application of the threshold, which was meant to measure the relative time that each parent is responsible for and cares for the children over the course of a year. There are no appeal cases on point.

Regardless of the approach, calculating the time itself is a difficult task. Some judges have commented that adding up the time that each spouse spends with the children is a cumbersome and unhelpful process because it does not help parties determine how much support should be paid in the circumstances. As is pointed out succinctly in *Rosati* v. *Dellapenta*,[203] tallied hours tell the court nothing of parenting or expenses. Counting time also poses many evidentiary difficulties, especially with self-represented litigants.

[201] **See, for example, *Nitsopoulos* v. *Alousis* (2000), 5 R.F.L. (5th) 430 (Ont. Sup. Ct. Just.), where the court looked at the "general pattern," which meant that summers and holidays were excluded from the calculation of time; *Dempsey* v. *Dempsey* (14 July 1997), Halifax 97-17360, [1997] N.S.J. No. 327 (N.S.S.C.), where days and nights were the standard; *Droit de la famille-2912*, [1998] R.D.F. 285 (C.S.), where Justice Mireault counted time in hours; *Droit de la famille-2871*, [1998] R.D.F. 111 (C.S.), where overnight visits were calculated.**

[202] **See *Meloche supra* note 35; *Yaremchuk supra*, note 162; *Kolada* v. *Kolada* (2000), 6 R.F.L. (5th) 288, 260 A.R. 160 (Alta. Q.B.); *Hamm* v. *Hamm*, [1998] N.S.J. No. 139 (S.C.); *Mosher* v. *Martin* (1998) 166 Nfld. & P.E.I.R. 97, 511 A.P.R. 97 (Nfld. U.F.C.); *Crofton* v. *Sturko* (1998) CarswellBC 36, Docket Victoria 5939/32257 Judgment January 13, 1998 (B.C. Master); *Spanier* v. *Spanier* (1998), 52 B.C.L.R. (3rd) 343, 40 R.F.L. (4th) 329 (S.C.) [hereinafter *Spanier*]; *Cross* v. *Cross* (1998) 40 R.F.L. (4th) 242 (B.C.S.C.); *de Goede, supra* note 35).**

[203] ***Rosati* v. *Dellapenta* (1997), 35 R.F.L. (4th) 102 (Ont. Ct. Gen. Div.).**

DETERMINATION OF THE AMOUNT OF SUPPORT

ISSUES

When the time threshold is met, the court has to consider the three factors set out in paragraphs 9(a), (b), and (c) to decide the amount of the support order. Section 9 requires no formula, giving judges discretion to consider individual circumstances when the child support tables would not necessarily achieve a fair result.

Judges have used several approaches and some courts have not referred to all three of the factors. In some cases, the courts review the mandated factors, or at least some of them, and determine an amount without following any set formula. In many other cases, courts employ one of at least three different formulae to help them decide the appropriate amount of support. As is discussed below the courts of appeal in both British Columbia and Newfoundland and Labrador have decided cases directly on this point.

Although judges often cite the table values when determining support orders, and although the table values form the basis for each of the formulae, judicial discretion is still very active. The family's particular circumstances seem to determine judges' orders to some degree. Judicial discretion may result in fair amounts for many people who appear before the court, but it undermines the goals of simplicity of proceedings and certainty of result.

CASE LAW

The following review of selected cases highlights the various ways that courts have decided the support amount and discusses some of the advantages and disadvantages of each.

NO FORMULA

In many cases, the court exercises its discretion without applying a formula. For example, in *Henke* v. *Henke*,[204] the father established the shared custody time threshold, but the court refused to reduce his support payable from the table amount, since his only additional expense was food. The court considered all of the section 9 factors and concluded that the increased access did not cost the father much more than a usual access regime, nor did it save the mother a significant amount of money.

In this case, and others like it, the court squarely places the onus on the paying parent to establish an economic reason to reduce support.[205] This generally has the advantage of focusing on the needs of the child in the circumstances, but it may lead to inconsistent results and it gives parents little guidance in determining the amount of support.

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[204] *Henke* v. *Henke* (2000), 3 R.F.L. (5th) 226 (Sask. Q.B.).

[205] See also *Green supra*, note 168; *Dennett* v. *Dennett* (1998), 225 A.R. 50, 61 Alta. L.R. (3d) 245 (Q.B.); *Ward* v. *Ward* (2000), 7 R.F.L. (5th) 197 (Ont. Sup. Ct. Just.).

SIMPLE FORMULA

In some early cases, courts used a formula that reduced the table amount in direct proportion to the amount of time the paying parent spent with the children. This became a starting point in determining the support amount.[206] That is, the court starts by determining the table amount payable to the receiving parent and reduces that number proportionally by the percentage of the time that the paying parent spends with the children.[207]

There are several advantages to the simple formula approach: it is easy to calculate, promotes certainty, and bases orders on the table values, in keeping with the Guidelines. However, the formula may reduce support by more than the receiving parent saves because of the shared custody arrangement. This formula may also reduce support by more than the amount of the extra costs that the paying parent has to pay, because the formula does not account for the fact that shared custody may not increase the paying parent's fixed costs. Finally, this model may hurt children living with lower income parents, because the support will be reduced regardless of the child's needs.

BASIC SET-OFF FORMULA

The basic set-off formula has been used in many cases in several jurisdictions.[208] It is very similar to the approach required by section 8 of the Guidelines in split custody cases.[209] With this approach, support is calculated by determining the table value for each of the parents as though the other were seeking support. Unlike split custody cases, the table amounts are determined by considering the total number of children for whom the parents share custody. The court compares the resulting table values for each parent. The amount payable is the difference between the two.[210]

This method is relatively easy and objective and it meets the Guidelines objectives of certainty and predictability. It also accounts for the fact that shared custody is more expensive than sole custody, since the table values for the total number of children are compared. However, as with any formula, it doesn't consider the unique spending patterns of the particular family.

SET-OFF FORMULA WITH A MULTIPLIER

Many courts favour this approach, particularly in Ontario.[211] It is similar to the basic set-off formula described above, but the support amount is increased by a factor called the multiplier. In many courts, the multiplier has been 1.5.[212]

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[206] See, for example, *Spanier*, *supra* note 202; *Baddeley* v. *Baddeley* (10 December 1999), Vancouver D108663, [1999] B.C.J. No. 2835 (B.C.S.C.); *McKerracher* v. *McKerracher* (9 October 1997), Kamloops 98-01833, [1997] B.C.J. No. 2257 (B.C.S.C.). However, as is discussed in more detail below, in *Green* (*supra*, note 168), the British Columbia Court of Appeal subsequently rejected the use of a single definitive formula in all cases.

[207] Support payable pursuant to the simple formula = (table amount payable to receiving parent) X (% of time receiving parent spends with the child).

[208] See *Middleton supra*, note 143; *Hubic* v. *Hubic*, (1997), 157 Sask. R. 150 (Q.B.); *Peacock* v. *Peacock* (1999), 215 N.B.R. (2d) 39, 551 A.P.R. 39 (Q.B.); *Mertler* v. *Kardynal* (1997), 161 Sask. R. 151, 35 R.F.L. (4th) 72 (Q.B.) [hereinafter *Mertler*]; *Soderberg* v. *Soderberg* (1998), 42 R.F.L. (4th) 403 (N.W.T.S.C.).

[209] For a detailed review of the guidelines split custody provision, see "Section 8: Split Custody."

[210] Support payable pursuant to the basic set-off formula = (table amount payable to the receiving parent) - (table amount payable to the paying parent).

[211] See *Hunter* v. *Hunter* (1998), 60 O.T.C. 97, 37 R.F.L. (4th) 260 (Ont. Ct. (Gen. Div.)) [hereinafter *Hunter* cited to O.T.C.]; *Dilny* v. *Dilny* (1999), 174 Nfld. & P.E.I.R. 178, 47 R.F.L. (4th) 133 (Nfld. U.F.C.); *Stanford* v. *Cole* (1998), 170 Nfld. & P.E.I.R. 29, 43 R.F.L. (4th) 237 (Nfld. U.F.C.). Some Ontario cases have rejected this approach. See *Crowther* v. *Diet* (21 October 1998), Windsor 96-DV-29092, [1998] O.J. 5376 (Ont. Ct. (Gen. Div.)); *Burns* v. *Burns* (1998), 70 O.T.C. 147, 40 R.F.L. (4th) 32 (Ont. Ct. (Gen. Div.)).

[212] Support payable pursuant to the basic set-off formula with a multiplier = 1.5 X (table amount payable to the receiving parent – (table amount payable to the paying parent).

The multiplier recognizes that shared custody arrangements are more expensive than sole custody arrangements. Using it adjusts the amount upward to approximate the actual savings the receiving parent enjoys because of the shared custody arrangement. Use of the multiplier also reduces the possibility that an inadequate base amount of child support will be allocated between two households.

The method is objective, relatively easy to calculate, and offers certainty and predictability, in keeping with many of the objectives of the *Federal Child Support Guidelines*. As with any formula, when the set-off formula is used with a multiplier, courts and parents do not have to calculate the details of the costs and savings associated with shared custody, thereby significantly simplifying court procedures.

However, a strict formula is inflexible and may be unfair to some families. In addition, many people note that there isn't yet enough research to prove that any given multiplier will accurately reflect the increased costs of shared custody.[213] A 1.5 multiplier assumes that 50 percent of the costs of child rearing, such as housing and transportation, are fixed.

In cases where one parent has no ability to pay (table value of 0), this method results in support orders 50 percent higher than the table amount of the other parent. The courts have remedied this difficulty by limiting the amount payable to the table value of the paying parent.

APPEAL CASES

There are only two appeal cases related to determining the amount of support in shared custody situations.

In *Green*,[214] the question was the determination of the amount of support, given that the threshold was not at issue. The court noted that a dollar spent by an access parent is not a dollar saved by the receiving parent.[215] The court rejected the idea of a single, all-purpose formula as being too rigid. It examined, but did not endorse, the three prevalent judicial approaches: the simple percentage reduction approach used in *Spanier*,[216] the basic set-off method applied in *Middleton*,[217] and the set-off method with a multiplier adopted in the Ontario case of *Hunter*.[218]

In the end, the court reduced Mr. Green's support obligation from the table amount by $250 after considering all of the section 9 factors. In coming to that conclusion, the court considered extensive evidence of the costs that Mr. Green attributed to his access (paragraph 9(b)) and the parties' relative financial positions (paragraph 9(c)). Although various formulae helped the court, it followed none of them. The decision in *Green* promotes relatively unfettered judicial discretion in determining the amount of support in all shared custody cases.

In *Slade* v. *Slade*,[219] the trial judge determined the amount of child support by using a straight set-off of the parties' respective table values for all of the children. The father wanted to overturn the amount on appeal, arguing in part that the judge at trial did not consider all of the elements of section 9 of the Guidelines, as required. The Honourable Mr. Justice Cameron, for the Newfoundland Court of Appeal, upheld the order, stating:

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[213] **See T.J. Espenshade, *Investing in Children: New Estimates of Parental Expenditures* (Washington: Urban Institute Press, 1984).**

[214] ***Green, supra* note 168.**

[215] **And the receiving parent's expenses do not decrease by 1 percent for each 1 percent of the time the child is out of her care. With access 40 percent of the time, the primary parent's expenses are not reduced by 40 percent. Some costs are fixed, such as work-related child care, housing, and overhead related to the child. Some costs are "shiftable," such as meals, clothing, and entertainment. Shared custody is more expensive than sole custody since both homes have redundant costs.**

[216] ***Spanier, supra* note 202.**

[217] ***Middleton, supra* note 143.**

[218] ***Hunter, supra* note 211.**

[219] ***Slade* v. *Slade* (2001) 197 Nfld. & P.E.I.R. 4, 195 D.L.R. (4th) 108 (Nfld. C.A.).**

> No one approach has been accepted by the courts adjudicating support issues under section 9 of the Guidelines. Two of the approaches, which have been used by various courts, were advocated by counsel before the trial judge.... Ultimately the trial judge accepted the approach suggested by counsel for the wife and adjusted the amount to account for childcare expenses.[220]

The court then discussed other possible approaches, notably the set-off with a multiplier approach. It decided that this approach should be used only when there isn't enough evidence proving the actual costs of shared custody.

> The multiplier has been used in a number of cases in this Province and, to be frank, when specific evidence regarding the increased cost of shared custody is not before the trial judge the multiplier would appear to be a method of providing rough justice . . .What is clear is that under s. 9 the trial judge is given a great deal of discretion in fixing the amount of support and no one approach can be said to be the only correct method of determining support in shared custody situations.[221]

Neither *Green* nor *Slade* appears to have settled the question of determining the amount of support in shared custody situations.

THE QUEBEC APPROACH

In Quebec, the child support amount is adjusted in two distinct scenarios: when the paying parent has access for more than 20 percent and less than 40 percent of the time, or when parents share custody. Shared custody applies to situations where each parent has custody of the children at least 40 percent of the time.

In the first scenario, when custody is not shared, the paying parent's contribution to child support is reduced in proportion to the access,[222] creating a sliding scale for support. However, since only time above 20 percent is considered, this reduces the impact of the reduced support. When parents share custody, the support adjustment is much more significant because the paying parent's base contribution will be made directly proportional to the custody time he or she assumes.

Unlike the *Federal Child Support Guidelines*, child support orders made under the *Quebec Child Support Guidelines* are determined according to the income of both parents.

OTHER APPROACHES

Jurisdictions outside Canada use various approaches to determine support in shared custody situations.

In the United States, statutes in individual states govern child support. When custody is shared, states use several methods to determine child support: some apply a formula;[223] some use a sliding scale for access time greater than a certain threshold that lies between 20 percent and 40 percent;[224] and some define shared custody or extraordinary visitation in other ways to permit a departure from the table values.[225]

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[220] ***Ibid.* at para. 18.**

[221] ***Ibid.* at paras. 19, 20.**

[222] **Support is not reduced in direct proportion to the percentage of access. Rather, each parent's contribution is adjusted according to the percentage of access over 20 percent and the new proportions are used to calculate support.**

[223] **For example, Hawaii (set-off formula for equally shared custody), Kansas (set-off formula with a multiplier), New Mexico (set-off formula with a multiplier when each parent has an equal number of 24-hour days of responsibility), Montana (set-off formula with a 2X multiplier when each parent has the children at least 151 days and nights per year).**

In states where the threshold is defined as substantially equal time, the guidelines generally require use of a formula to calculate support. However, most of these states will allow the table values to be adjusted if access exceeds a fixed percentage of time, as long as access is not substantially equal. In those states that use time thresholds between 20 percent and 40 percent, many use a sliding scale to reduce support proportionally with the amount of access.

Australia allows courts to depart from the usual formula when the paying parent has access between 10 percent and 40 percent of the time or when parents share custody. Support is reduced by one formula if access is between 10 percent to 19 percent of the time, by another for 20 percent to 29 percent of the time, and by yet another for 30 percent to 39 percent of the time. The deductions increase at each level. If the child spends more than 40 percent of his or her time with each parent, this is defined as shared custody.

New Zealand allows courts to depart from the usual formula when there is a substantially equal sharing of care of the child. This occurs when the paying parent has care of the child overnight for at least 40 percent of the time during the year or if the paying parent shares substantially equal ongoing daily care of the child with the other parent. In these cases, child support is calculated according to a shared custody formula; the amount for one child is half the amount for one child in a sole custody situation.

AMENDMENTS

There have been no amendments to this provision since the introduction of the *Federal Child Support Guidelines*.

RECOMMENDATION

The 40-percent threshold test should not be changed. However, when the time threshold is met, courts will have to determine support by using a set-off formula based on the table value for the total number of children for whom the parents maintain a shared residence, unless that amount is deemed inappropriate based on, for example, how the parents share the child's expenses.

DISCUSSION

I. THRESHOLD TEST

The use of a threshold based on time has been criticized because it directly links child contact and support. However, no alternative can demonstrably improve the test. Such techniques as counting meals with the child or determining how much the parents share financial management of the child were rejected. Despite their merit, none of the alternatives simplifies the court process and each represents a radical departure from the status quo. Not basing the threshold test on time, for example, would increase uncertainty and litigation, contrary to the Guidelines objectives.

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[224] For example, Alaska (30-percent visitation); Colorado (92 overnights); District of Columbia (40-percent visitation); Maryland (35 percent of the time); Michigan (128 overnights); North Carolina (123 days); Oregon (35-percent custody); Utah (35 percent of overnight visits); Vermont (30-percent visitation); Virginia (110 days); Wisconsin (30-percent custody); California (formula itself considers access from 1 to 365 days per year).

[225] For example, Alabama (where physical placement of the child is shared in a way that gives the child frequent and continuing contact with both parents); Arizona (time spent with each parent is essentially equal and the expenses are equally shared); Iowa (shared custody); New Hampshire (shared custody); New Jersey (non-traditional custody or visitation arrangements); Florida (reduction for block visitation greater than 28 days); and New York (reduction based on expenses incurred during extended visitation).

The 40-percent time threshold has also been criticized as being too arbitrary. A parent who cares for a child 39 percent of the time may have a different child support obligation than someone who has a child 40 percent of the time. However, any fixed time threshold is arbitrary. The test can only be made less arbitrary by introducing a two-step, multi-step, or sliding scale approach. While these methods are less arbitrary, each more closely links child contact with the amount of support than does the current test and may not reflect actual costs. This creates an even greater financial incentive for each parent to leverage time spent with the child. This has the likely effect of increasing litigation, contrary to the guidelines objectives. In addition, these approaches would complicate court processes and increase uncertainty, contrary to the Guidelines objectives.

The time threshold could be lowered to, for example, 30 percent. But fixing the time threshold at a lower percentage will magnify some of the drawbacks of the current regime, including the financial incentive to litigate time, because more parents will meet the threshold. In addition, a relatively low time threshold may be met in cases where there are little or no increased fixed costs to the paying parent or significant savings to the receiving parent. Parents who spend extensive time with their child, but who do not meet the 40-percent time threshold, may be able to use the section 10 undue hardship rules for relief from payment of the table amount.

Going the other way, we could increase the time threshold or use the concept of "substantially equal". This has some advantages, including perhaps reducing the link between child support and child contact. It is possible, but by no means certain, that this language might decrease the incentive to leverage child contact to improve financial results. A substantially equal time threshold ensures that parents who meet the test each have significant fixed costs, a primary reason to depart from the table values.

However, this high threshold will be unfair to paying parents who have the child in their care for very significant periods of time and who have increased fixed and other costs, but who do not meet the threshold. In addition, *substantially equal* is not defined and would undoubtedly cause some confusion and litigation. No other jurisdiction has implemented a "substantially equal" threshold without offering relief for paying parents with an intermediate level of contact. Payment of the table amount for a parent who falls just short of the "substantially equal" time threshold raises the question of fairness, especially when one considers that someone with little or no contact with the child will be required to pay the same child support amount.

Since none of the alternatives to the 40-percent threshold test would demonstrably advance the Guidelines objectives, this threshold should not be changed.

II. DETERMINING THE AMOUNT

The federal Department of Justice recommends using the basic set-off method to determine the amount of support when parents meet the shared custody time threshold. The set-off formula would be based on the table values for the total number of children for whom the parents share custody. Courts should have the discretion to depart from the formula when using it would be inappropriate. To decide whether the formula is appropriate, the court may consider how the spouses share the child's expenses. This factor is especially relevant in determining the appropriate amount of support.

Because it is based on the total number of children, the set-off method accounts for the increased costs of shared custody. This situation differs from split custody situations, in which the table values account for the number of children in each parent's care. The set-off method is consistent with the Guidelines approach that requires each parent's contribution to be based on what it would have been if the family were intact.

Use of a presumptive formula makes it easier to determine support and provides certainty and predictability. It gives parents and courts more direction in determining the amount of support in shared custody situations while maintaining flexibility. Overriding judicial discretion to depart from the formula in appropriate cases means that unfair amounts would not be ordered. Many courts are already applying this test in appropriate cases.

We do not recommend a multiplier. There is no current research showing how much shared custody increases costs. Without empirical evidence on the relative proportion of fixed and "shiftable" costs, the Department of Justice cannot support the use of a multiplier as a presumption in shared custody cases. Specifically, a 1.5 multiplier, as is used in some U.S. states, assumes that 50 percent of the costs of child rearing are fixed. However, if fixed costs are less than 50 percent of total child costs, the multiplier overcompensates the receiving parent.

For example, consider the following examples that compare the amount payable if the parents split custody (equal number of children in the custody of each parent) or if they share custody (using both the basic set-off method and the set-off method with a multiplier that is capped at the table value).

1. *An Ontario family with two children.* The paying parent's annual Guidelines income is $40,000, whereas the receiving parent earns $10,000 a year.

Method	Split custody	Shared custody with basic set-off method	Shared custody with basic set-off method and multiplier
Payer's contribution	345	570	570
Recipient's contrib.	79	119	119
Set-off	345 - 79 = 266	570 - 119 = 451	570 - 119 = 451 (x 1.5 = 676.50)
Total payable	266	451	570 (capped at table amount)

2. *An Alberta family with four children.* The paying parent's annual Guidelines income is $40,000, whereas the receiving parent earns $20,000 a year.

Method	Split custody	Shared custody with basic set-off method	Shared custody with basic set-off method and multiplier
Payer's contribution	571	897	897
Recipient's contrib.	300	488	488
Set-off	571 - 300 = 271	897 - 488 = 409	897 - 488 = 409 (x 1.5 = 613.50)
Total payable	271	409	613.50

3. *A New Brunswick family with four children.* The paying parent's annual Guidelines income is $40,000, whereas the receiving parent earns $10,000 a year.

Method	Split custody	Shared custody with basic set-off method	Shared custody with basic set-off method and multiplier
Payer's contribution	545	861	861
Recipient's contrib.	87	114	114
Set-off	545 - 87 = 458	861 - 114 = 747	861 - 114 = 747 (x 1.5 = 1,120.50)
Total payable	458	747	861 (capped at table amount)

In each case, the set-off method for shared custody provides substantially higher values than those for split custody. This is so because the table values for all of the children are considered, which accounts for the increased costs of shared custody.

When determining support, courts should have to use a set-off formula based on the table value for the total number of children for whom the parents share custody, unless that amount is deemed inappropriate. One of the most important factors in appropriateness is the way the spouses share the children's expenses.

SECTION 10: UNDUE HARDSHIP

Undue Hardship

10.(1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

(2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:

- (a) the spouse has the responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;
- (b) the spouse has unusually high expenses in relation to exercising access to a child;
- (c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;
- (d) the spouse has a legal duty to support a child, other than a child of the marriage, who is:
  - (i) under the age of majority, or
  - (ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessaries of life; and
- (e) the spouse has a legal duty to support any person who is unable to obtain the necessaries of life due to an illness or disability.

(3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of the sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.

(4) In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household standards of living test set out in Schedule II.

(5) Where the court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.

(6) Where the court makes a child support order in a different amount under this section, it must record its reasons for doing so.

BACKGROUND

The undue hardship provision recognizes that, sometimes, a parent or child can suffer undue hardship if the parent pays the table amount, or the table amount plus special expenses. This section permits courts to set a different amount.

There are three distinct steps to determining the amount of child support when a parent claims undue hardship.

1. The parent making the claim must show that paying the table amount would cause undue hardship for the parent or child.
2. The parent claiming undue hardship has to show that his or her household standard of living is lower than that of the other parent.
3. If the first two steps are cleared, the court decides on a new support amount. Courts may (but do not have to) change the table amount of support.

STEP 1: DEMONSTRATION OF UNDUE HARDSHIP

To help courts and parents decide whether undue hardship would result if the table values were ordered, subsection 10(2) lists five circumstances that may cause a parent or a child to suffer undue hardship. They are:

- unusually high debts from supporting the family before the parents separated or resulting from earning a living;
- unusually high expenses associated with access to a child;
- a legal duty under a judgment or order to support another individual;
- a legal duty to support a child, other than the child of the marriage, who is under the age of majority or who, owing to illness, disability, or other cause (including education), cannot support himself or herself; or
- a legal duty to support a person who cannot get the necessaries of life due to illness or disability.

Because the list is not exhaustive, other circumstances could give rise to a claim for undue hardship.

PARAGRAPH 10(2)(A): DEBTS

In some circumstances, the debt load of a parent may lead to a finding of undue hardship. If this leads to a changed support amount, the court may decide that, when the debt is paid, the amount payable will change again. This allows courts to grant temporary relief so the parent can pay the debts without requiring another court appearance after the debt is paid.

PARAGRAPH 10(2)(B): ACCESS EXPENSES

Access expenses may be unusually high because of the extensive time a parent spends with the children or because the parent otherwise has large expenses related to access, such as airfare. On the other hand, if the paying parent spends little or no time with the children, the receiving parent may be the one with extra costs, such as babysitting fees.

PARAGRAPH 10(2)(C): JUDGMENT OR AGREEMENT TO SUPPORT ANOTHER INDIVIDUAL

A person may already have to support a spouse or children from prior relationships. Although the table amounts are presumed to apply in these circumstances, this section of the Guidelines recognizes that a pre-existing requirement to pay support to others may cause a parent or a child to suffer undue hardship, particularly those in lower income families.

PARAGRAPH 10(2)(D): LEGAL DUTY TO SUPPORT ANOTHER CHILD

The legal duty to support other children (in a second family, for example) can cause undue hardship if the parent also has to pay the table amount. These other children may be the parent's biological children, adoptive children, or stepchildren.[226] These commitments may reduce the financial resources available for the children involved. This provision provides financial relief and promotes equitable treatment of all children whether they are natural children, adoptive children, or stepchildren.

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[226] **For a detailed discussion of a parent's child support obligation to stepchildren, please refer to "Section 5: Spouse in Place of a Parent."**

PARAGRAPH 10(2)(E): LEGAL DUTY TO SUPPORT AN ILL OR DISABLED PERSON

A parent may face undue hardship because he or she must support somebody, such as a previous spouse, who is ill or disabled.

STEP 2: COMPARISON OF THE HOUSEHOLD STANDARDS OF LIVING—SUBSECTION 10(3)

For a parent who would suffer undue hardship if the table amount were ordered, the next step is to show that his or her household does not enjoy a higher standard of living than does the other parent's. This ensures that the child support amount is not reduced when the child lives with a parent whose standard of living is lower still. Under subsection 10(4) of the *Federal Child Support Guidelines*, one way to compare standards of living is to use the Comparison of Household Standards of Living Test, found in Schedule II.

STEP 3: DETERMINATION OF THE AMOUNT OF SUPPORT

Once the first two steps have been cleared, the courts have broad discretion to determine the appropriate amount of support. If a court uses this discretion to order a different amount, it must record its reasons for doing so, per subsection 10(6).

INTENT

The undue hardship provision is not meant to be used often. There is a strong presumption that paying parents are able to afford the table amounts because the tables represent reasonable amounts in average family circumstances. In addition, the Guidelines specifically permit a departure from the table amounts in special circumstances, such as when parents share custody, or when the paying parent earns over $150,000 annually.

Section 10 balances the Guidelines objective of consistency with the need for a fair standard of support in exceptional cases.

APPLICATION

Courts have narrowly interpreted each element of the undue hardship test. Case law overwhelmingly confirms that the requesting parent must establish undue hardship and must demonstrate that the other parent is not even worse off.[227] Even when a parent meets the requirements of the first two steps, courts may exercise their discretion by refusing to order a different amount of support.[228]

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[227] See, for example, *Messier* v. *Baines* (1997), 161 Sask. R. 132 (Q.B.) [hereinafter *Messier*]; *Van Gool* v. *Van Gool* (1998), 166 D.L.R. (4th) 528, 59 B.C.L.R. (3d) 395 (B.C.C.A.) [hereinafter *Van Gool* cited to D.L.R.]; *supra* note 49.

[228] See, for example, *Hughes* v. *Bourdon* (5 August 1997), Ontario 98-06615, [1997] O.J. No. 4263 (Ct. Just. (Gen. Div.)), where other circumstances surrounding the paying parent's obligation to pay would have made the application of section 10 unfair to the recipient and the children.

STEP 1: DEMONSTRATION OF UNDUE HARDSHIP

A parent will not necessarily clear the first step simply by showing the existence of one or more of the enumerated circumstances that may give rise to undue hardship.[229] The claiming parent must also show that the circumstances personally affect him or her and that they do in fact cause undue hardship.[230] Separation generally causes both parties to suffer financial hardship, thus hardship alone will not give rise to a change in the support order.

In *Van Gool*,[231] the British Columbia Court of Appeal confirmed the high threshold required by this section. Mr. Justice Prowse, for the court, said in paragraph 51:

> Since the basic tables were designed to be a "floor" for the amount of maintenance payable, rather than a ceiling, it is not surprising that the authorities have held that the threshold for a finding of undue hardship is high. Hardship is not sufficient; the hardship must be *undue*, that is, *exceptional*, *excessive*, or *disproportionate* in all of the circumstances.

Other courts have interpreted the word *undue* to mean *excessive*, *extreme*, *unreasonable*, *unjustified*, and *improper*.[232]

PARAGRAPH 10(2)(A): DEBTS

Each element of this provision has been interpreted very restrictively. Judges have only reduced child support because of debt in exceptional circumstances, an approach that is consistent with cases considered before the introduction of the *Federal Child Support Guidelines*.

PARAGRAPH 10(2)(B): ACCESS EXPENSES

The courts have very narrowly construed each element of the phrase *unusually high expenses in relation to access*, which appears in paragraph 10(2)(b). For example, in the case of *Williams* v. *Williams*,[233] the paying parent's costs to travel between Nova Scotia and the Northwest Territories to exercise access were not held to be *unusually high*. In a limited number of cases, courts have concluded that access expenses are *unusually high* in light of the extensive access that a paying parent exercises, not necessarily because of any single large payment such as airfare.[234] Few courts have accepted a lack of access as a circumstance that may cause undue hardship for the receiving parent.

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[229] See, for example, *Crawley* v. *Tobin* (1998), 171 Nfld. & P.E.I.R 92, 42 R.F.L. (4th) 327 (Nfld. Unif. Fam. Ct.).

[230] See, for example, *Schmid* v. *Smith* (1999), 1 R.F.L. (5th) 447 (Ont. Sup. Ct. Just.) [hereinafter *Schmid*].

[231] *Van Gool, supra* note 227.

[232] See, for example, *Mayo* v. *O'Connell* (1998), 170 Nfld. & P.E.I.R. 157, 42 R.F.L. (4th) 193 (Nfld. Unif. Fam. Ct.) [hereinafter *Mayo* cited to Nfld. & P.E.I.R.]; *Ellis* v. *Ellis* (1999), 175 N.S.R. (2d) 268, 45 R.F.L. (4th) 234 (C.A.); *Swift* v. *Swift* (5 February 1998), Kingston 98-04648, [1998] O.J. 501 (Ont. Ct. (Gen. Div.)).

[233] *Williams* v. *Williams*, [1997] N.W.T.R. 303, 32 R.F.L. (4th) 23 (S.C.) [hereinafter *Williams* cited to N.W.T.R.]. See also the following cases where the access expense was held not to be "unusually high": *Paulhus* v. *Regnier* (17 September 1997), Saskatoon 311, [1997] S.J. No. 625 (Q.B.) [hereinafter *Paulhus*], where the husband's access costs of 10 percent of his gross income of $43,000 did not constitute hardship, even though he lived 900 miles away and exercised access four times per year; *Sutton* v. *Sutton* (5 August 1999), Victoria 98 4224, [1999] B.C.J. No. 1933 (S.C.), where there were access costs of $3,800 to travel between the U.S. and Canada; *Byrne* v. *Byrne* (12 April 1999), Kamloops 010434, [1999] B.C.J. No. 1087 (S.C.), where there were access expenses of $3,500 for a paying parent with an annual income of $50,000; *Eadie* v. *Eadie* (18 September 1998), Fredericton 98-19428, [1998] N.B.J. No. 352 (Q.B.), where travel between two provinces was required.

The courts are more likely to lower the amount if it was the custodial parent who decided to move.[235] The comments of the court in the case of *Marlow* v. *Berger*[236] illustrate this judicial point of view:

> In this case, the father chose to move to Toronto for employment purposes. That is not to be held against him but he cannot use it as a sword to obtain relief as he has asked. In this court's view, the phrase *unusually high access costs* relates to, among other things, circumstances beyond the control of the payor or a consensual decision made for the benefit of the child.

PARAGRAPH 10(2)(C): JUDGMENT OR AGREEMENT TO SUPPORT ANOTHER INDIVIDUAL

Few parents have sought a finding of undue hardship on this basis and, as such, this provision has had very limited application.

PARAGRAPH 10(2)(D): LEGAL DUTY TO SUPPORT ANOTHER CHILD

Under the Guidelines, the majority of undue hardship claims have been based on this section and most applications have been unsuccessful. Courts have very strictly construed each element of this provision.

A parent's legal duty to support a second family does not in itself create undue hardship.[237] The parent seeking relief must establish not just the existence of an obligation to another child, but also *indicators of unusual financial pressure*.[238] One has to show that supporting other children significantly contributes to one's financial difficulties.[239] There must also be a legal duty to support the children, not only a moral duty.[240] Many judges have refused to grant relief in part because the paying parent's second spouse has decided not to work, thereby lowering the paying parent's family income.[241] As a result, many claims have been dismissed because the applicant couldn't show undue hardship.[242] In addition, the mere fact that the applicant's standard of living is lower than that of the other spouse does not automatically result in undue hardship, even if this lower standard is due in part to the applicant's legal duty to support another child.

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[234] See, for example, *Petrocco* v. *Von Michalofski* (1998), 36 R.F.L. (4th) 278 (Ont. Ct. Just.), aff'd (1998), 120 O.A.C. 193, 43 R.F.L. (4th) 372 (Ct. Just.) [hereinafter *Petrocco* cited to R.F.L.]; A paying parent is more likely to succeed in an undue hardship application if long distance rather than extensive access time is the reason that access expenses are unusually high. See *Mayo*, *supra* note 232, where the court disagreed with *Williams*, *supra* note 233, and determined that travel costs for sending the children between Florida and Newfoundland, even when the parents shared those costs, were "unusually high." See also *Sutherland* v. *Sutherland* (10 February 1998), Cranbrook 98-04350, [1998] B.C.J. No. 342 (S.C.), where access expenses of $300 per month were considered "unusually high" for a mother with an income of $64,000.

[235] See, for example, *Aker* v. *Howard* (1998), 43 R.F.L. (4th) 159 (Ont. Ct. (Gen. Div.)).

[236] *Marlow* v. *Berger* (25 September 1998), Peterborough 98-16637, [1998] O.J. No. 3903 at para. 9 (Ont. Ct. (Prov. Div.)) [hereinafter *Marlow*].

[237] See *Messier*, *supra* note 227; *Hansvall* v. *Hansvall* (1997), 160 Sask. R. 201, [1998] 4 W.W.R. 202 (Q.B.).[hereinafter *Hansvall* cited to Sask. R]; *Nagy* v. *Tittemore* (1997), 162 Sask. R. 54 (Q.B.) [hereinafter *Nagy*]; *Jackson* v. *Holloway* (1997), 161 Sask. R. 31, 35 R.F.L. (4th) 272 (Q.B.) [hereinafter *Jackson* cited to Sask. R.].

[238] *Foyle* v. *Foyle* (29 January 1998), Nelson 98-07777, [1998] B.C.J. No. 263 (S.C.).

[239] See *Boudreau* v. *Vickery* (1998), 167 N.S.R. (2d) 116 (S.C.).

[240] Thus, a claim for undue hardship will be dismissed if the paying parent has no legal obligation to support the children of a common-law spouse. See *Nishnik* v. *Smith* (1998), 164 Sask. R. 225, 39 R.F.L. (4th) 105 (Q.B.).

[241] See, for example, *McPhee* v. *McPhee* (16 February 1999), Vancouver A860540, [1999] B.C.J. No. 337 (S.C.).

[242] *Chong* v. *Chong* (1999), 47 R.F.L. (4th) 301 (B.C.S.C.); followed in *Cook* v. *Hare* (1999), 46 R.F.L. (4th) 343 (B.C.S.C.).

In *Van Gool*,[243] the court confirmed this, deciding that the parent seeking relief must show that the obligation makes paying the table amount an undue hardship. The person claiming undue hardship must provide cogent evidence that the costs incurred for the other child are beyond those associated with most children.

PARAGRAPH 10(2)(E): LEGAL DUTY TO SUPPORT AN ILL OR DISABLED PERSON

Very few cases have been determined on the basis of this provision and, as such, it has had very limited application.

OTHER CIRCUMSTANCES

Case law establishes that the subsection 10(2) list of circumstances is not exhaustive and that other factors may be considered.[244] However, courts are reluctant to expand the scope of undue hardship beyond the circumstances listed in subsection 10(2).[245] Courts are especially cautious if the receiving parent wants to increase the table amount because other circumstances have caused undue hardship; very few such cases have been successful.[246]

STEP 2: COMPARISON OF THE HOUSEHOLD STANDARDS OF LIVING—SUBSECTION 10(3)

The parent asking for the change may have a lower household standard of living than that of the other parent. But this does not in itself lead to a finding of undue hardship.[247] Case law overwhelmingly confirms that courts must compare the parents' household standards of living only after finding undue hardship.[248] Thus, this provision limits the number of successful claims for undue hardship.

Some courts rely on the optional Comparison of Household Standards of Living Test, found in Schedule II.[249] When courts did not use this test, they instead considered a wide variety of factors, including the parents' relative capital positions, debt, child care, and the financial contribution of the parent's spouse, if any.[250]

STEP 3: DETERMINATION OF THE AMOUNT OF SUPPORT

Courts have exercised broad discretion to determine the appropriate amount of support in undue hardship cases.[251] There is no one way to do this.[252] In some cases, even when both steps one and two were cleared, courts exercised their discretion not to change the table amount.

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[243] *Van Gool, supra* note 227.

[244] See, for example, *MacLeod* v. *Druhan* (1997), 165 N.S.R. (2d) 70, 34 R.F.L. (4th) 206 (Fam. Ct.); *St. Mars* v. *St. Mars* (1997), 160 Sask. R. 221 (Q.B.), where the court found that the paying parent's tuition expense might constitute undue hardship; *Stevenson* v. *Stevenson* (14 January 1999), Courtenay 99-05548, [1999] B.C.J. No. 324 (S.C.), where the court held that a paying parent's high debt, due to the fact he was financing his second wife's business, constituted undue hardship.

[245] See, for example, *Bergman-Illnik* v. *Illnik*, [1998] N.W.T.R. 131 (S.C.), where the court found that Revenue Canada tax arrears did not constitute undue hardship. See also *Brown* v. *Carlston* (3 June 1998), Regina 014582, [1998] S.J. No. 396 (Q.B.).

[246] One case where the table amount was increased at the request of the receiving spouse is *Scharf* v. *Scharf* (1998), 40 R.F.L. (4th) 422 (Ont. Ct. Just.) [hereinafter *Scharf*], which is discussed below.

[247] See, for example, *Krislock*, *supra* note 136.

[248] See, for example, *Kramer* v. *Kramer* (9 August 1999), Winnipeg 95-01-41795, [1999] M.J. No. 338 (Q.B.).

[249] For a detailed review of the test, please see "Schedule II: Comparison of Household Standards of Living Test."

[250] See, for example, *Fry* v. *Hendrickson* (1998), 166 Sask. R. 305 (Q.B.).

[251] However, courts have generally refused to consider changing the table amount unless the parent seeking the change shows that he or she would suffer undue hardship (step 1) and that his or her household standard of living is lower than the other parent's (step 2).

[252] For examples of different ways of arriving at the child support amount in undue hardship cases see *Butler* v. *Ryan* (1998), 162 Nfld. & P.E.I.R. 284 (Nfld. S.C.).

In some cases, particularly when the circumstance that causes undue hardship is a legal duty to support another child, per paragraph 10(2)(d), courts have refused to reduce the table amount. Instead, they have somewhat reduced the payments to the receiving spouse because of special or extraordinary expenses, per section 7.[253] Courts are clearly reluctant to order less than the table amount because they view the table values as a minimum base or a floor for support.

In many cases where distance produces extensive access expenses, parents and judges instead agree to apportion the cost of those visits between the parents. Sometimes referred to as a *separate civil order*, this option is used in place of the undue hardship provision.

ISSUES

STEP 1: DEMONSTRATION OF UNDUE HARDSHIP

The undue hardship provision balances the Guidelines objectives of consistency and of a fair standard of support. However, many people feel that the very strict interpretation of this section has been unfair to children and paying parents who live far from each other. These parents may only be able to pay the table amounts by reducing their access, contrary to the children's interests.

PARAGRAPH 10(2)(B): ACCESS EXPENSES

The table values attempt to balance paying parents' average access costs and hidden costs incurred by receiving parents. Hidden costs include loss of career advancement opportunities and lost overtime. Thus, usual costs of access, such as meals, transportation, and entertainment, are borne by the paying parent as a normal pattern of spending and are contemplated by the guidelines amounts.[254]

By including unusually high access expenses as a possible cause of undue hardship, the Guidelines implicitly recognize that children may benefit from meaningful contact with both parents. This provision therefore promotes the principle that children should have as much contact with each parent as is consistent with their best interests.[255]

EXTENSIVE ACCESS

In a small number of cases, the extent and quality of access, or the lack of it, may cause undue hardship.

Applications to reduce support because of extensive access have generally succeeded only when the paying parent proves that paying the table amount would interfere with the quality of time that the children spend with the paying parent or would threaten the children's relationship with him or her. For example, in *Petrocco*,[256] the paying parent's annual income was $40,000, whereas the custodial parent's annual household income was nearly $300,000. In granting the application for undue hardship, Justice Métivier notes at paragraph 20:

> In this case, the access parent's role and importance may be detrimentally affected by an inability to offer the children a reasonable level of activity and comforts relative to that enjoyed in their primary residence. The payment of support at the Guideline level will interfere with the ability of the mother to provide such activities and comforts.

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[253] See, for example, *Wislesky* v. *Wislesky* (1999), 47 R.F.L. (4th) 208 (Ont. Ct. Just.).

[254] See, for example, *Williams*, *supra* note 233; *Marlow* , *supra* note 236.

[255] See, for example, *Paulhus*, *supra* note 233; *Jackson*, *supra* note 237. Subsection 16(10) of the *Divorce Act* codifies the principle of maximum contact.

[256] *Petrocco, supra* note 234. See also *Odway* v. *Odway* (23 April 1998), Manitoba Court of Appeal AF 97-30-03485, unreported.

In *Baranyi* v. *Longe*,[257] Justice Wright reduced the support amount from $236 to $50 per month for two children so that the father could continue to have extensive access and to maintain a second bedroom for the children.

LACK OF ACCESS

The undue hardship provision was intended to be available to either the paying or the recipient parent. However, there have been very few cases where the recipient parent has successfully sought an increase from the table amount on the basis of undue hardship. This may be so because the listed circumstances in subsection 10(2) appear to be available only to paying parents to reduce the support order. In addition, some courts are reluctant to increase support under this section out of concern that the undue hardship provision may become an indirect way of getting spousal support.[258]

But the support recipient can claim undue hardship in some circumstances. For example, the paying parent may exercise little or no access, thereby increasing not only the receiving parent's regular costs, but also his or her hidden costs.[259] While this approach has not usually worked,[260] *Scotcher* v. *Hampson*[261] suggests that a failure to exercise access could give rise to a claim for undue hardship, if this increases the receiving parent's costs. In *Scharf*,[262] lack of access visits led to an increase in child support. There, the parents each had custody of one of the two children. Justice Métivier found that the mother suffered undue hardship and reduced the amount she was required to pay in part because the other parent had irregular access.

PARAGRAPH 10(2)(D): LEGAL DUTY TO SUPPORT ANOTHER CHILD

For many years, courts and parents have struggled to determine the appropriate approach for determining child support when a parent has to support other children. The issue is complicated because the court must often decide between the competing interests of two (or more) sets of children. Courts are often faced with the difficult task of distributing limited resources between two or more households.

Many people think that financial hardship caused by subsequent family obligations should rarely reduce the child support amount. Paying parents, it is said, should fulfill child support obligations ahead of other, subsequent obligations, even if those obligations are to other children. That is to say that a parent should not be excused from a child support obligation because he or she chooses to have further children. This *first families first* approach has been adopted in many cases and is illustrated in the following comments from the case of *Jackson* v. *Holloway*:[263]

> A separated spouse with a child support obligation enters into a new family unit knowing he or she has an obligation and is expected to organize his or her affairs with due regard to that obligation. A general or generic reference to the overall expenses of a new household will not give rise to a claim of undue hardship.

[257] *Baranyi* v. *Longe* (10 February 1998), Kenora 99-00092, [1998] O.J. No. 606 (Ct. Just.).

[258] See, for example, *Middleton*, *supra*, note 143; *Racette* v. *Gamauf* (1998), 158 Nfld. & P.E.I.R. 38, 35 R.F.L. (4th) 357 (P.E.I. S.C.); *O'Hara* v. *O'Hara* (1997), 33 R.F.L. (4th) 37 (Sask. Q.B.).

[259] Before the *Federal Child Support Guidelines* came into effect, there was judicial support for the notion that support should be increased when the paying parent has little or no access. See, for example, *MacKinnon* v. *MacKinnon* (1988), 84 N.S.R. (2d) 363 (Fam. Ct.); *Russo* v. *Russo* (1988), 15 R.F.L. (3d) 243 (Ont. H.C.).

[260] The court in *Hourie* v. *Anderson* (5 November 1998), Prince Albert 326, [1998] S.J. No. 754 (Sask. Q.B.) questioned whether the undue hardship provisions allowed it to increase support because of a lack of access. In *Block* v. *Baltimore* (2000), 149 Man. R. (2d) 137, 5 R.F.L. (5th) 18 (Q.B.), the recipient claimed the paying parent's lack of access increased custody costs, but the court refused to increase support.

[261] *Scotcher* v. *Hampson* (1998), 41 R.F.L. (4th) 271 (Ont. Ct. (Gen. Div.)).

[262] *Scharf*, *supra* note 246.

[263] *Jackson*, *supra* note 237 at para. 19.

Other courts suggest that while every child has the right to support, the parent's subsequent family should be given a chance to succeed financially and shouldn't suffer because of the prior child support obligation.

As a result of these two judicial approaches to the difficult issue of second families, the outcome of any given case is difficult to predict, thereby undermining the Guidelines objective of consistent treatment of parents.

STEP 2: COMPARISON OF THE HOUSEHOLD STANDARDS OF LIVING—SUBSECTION 10(3)

Although courts have applied this second step as intended, research suggests that courts and parents have not been using the optional Comparison of the Household Standards of Living Test in Schedule II. Many legal observers, parents, and judges have criticized the test as being too complicated, too long, and too difficult to apply. For a detailed discussion of the Comparison of Household Standards of Living Test, please see the review of Schedule II.

STEP 3: DETERMINATION OF AMOUNT

Because families may live in so many different circumstances after separation, judges have broad discretion to determine the amount of support when they find undue hardship. As such, results are difficult to predict.

RECOMMENDATION

The federal Department of Justice does not recommend any changes to section 10.

Regarding unusually high access expenses due to distance, education and training should be used to promote the use of a separate civil order. Many court orders have already used separate provisions for access and the costs of access, particularly in mobility cases, so this is not entirely new. This approach maintains the important premise that the table values are a floor for support; in mobility cases, it also removes the rigid requirements of section 10. It is also consistent with subsection 16(6) of the Divorce Act, which allows the court making a custody or access order to "impose such other terms, conditions, or restrictions in connection therewith as it thinks fit and just." The approach permits parents to agree to an individual clause that may be tailored to suit the family's circumstances.

SECTION 11: FORM OF PAYMENTS

BACKGROUND

Even before the *Federal Child Support Guidelines*, the *Divorce Act* gave courts the power to order periodic or lump sum support, or both. This section was intended to establish the court's jurisdiction under the Guidelines to order periodic or lump sum support if necessary.

Form of Payments

11. The court may require in a child support order that the amount payable under the order be paid in periodic payments, in a lump sum or in a lump sum and periodic payments.

PAYMENT OF ORDERS

The courts have wide discretion: an order may be for a lump sum, for a definite or indefinite period, or for a period lasting until a specific event occurs. The court can also "impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just."

Although the child support Guidelines propose monthly orders, there may be rare instances where it is in the best interests of children for the courts to make lump sum orders. Although the Guidelines will help the courts determine the levels, the courts should continue to have wide powers to determine how orders should be paid.

APPLICATION

ISSUE

Courts have traditionally been reluctant to order lump sum child support.

CASE LAW

In *McLaughlin* v. *McLaughlin*,[264] the court held that support ordered under the Guidelines could be paid in periodic instalments other than monthly. In *Lobo* v. *Lobo*,[265] *Gibney* v. *Gibney*,[266] and *M.R.* v. *S.R.R.*,[267] the court ordered lump sum child support.

In *Lobo*,[268] the court found that, in light of the paying parent's record of poor money management, his refusal to seek alternative employment, his demonstrated willingness to risk his family's security for remote possibility of gain, and his unwillingness to sell real estate investments in the face of foreclosure action against the matrimonial home, it was proper to order lump sum child support.

In *Gibney*,[269] as the father had substantial assets, the court found it appropriate to order a lump sum payment to pay for the children's extraordinary expenses.

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[264] *McLaughlin* v. *McLaughlin* (1999), 172 D.L.R. (4th) 70, 44 R.F.L. (4th) 176 (B.C.C.A.).

[265] *Lobo* v. *Lobo* (1999), 240 A.R. 257, 45 R.F.L. (4th) 366 (Q.B.) [hereinafter *Lobo*].

[266] *Gibney* v. *Gibney* (4 March 1998), New Westminster 98-07820, [1998] B.C.J. No. 632 (S.C.) [hereinafter *Gibney*].

[267] *M.R.* v. *S.R.R.* (28 May 1998), Vancouver D100220, [1998] B.C.J. No. 1282 (S.C.) [hereinafter *M.R.*].

[268] *Lobo, supra* note 265.

[269] *Gibney, supra* note 266.

In *M.R.*,[270] the paying parent had a recent history of unemployment and illness and a long history of borrowing money from his mother to defray ordinary household expenses. The court found that those were ample reasons for ordering lump sum support from his only cash asset: proceeds from the sale of the matrimonial home. The court ordered lump sum child support based on the appropriate monthly child support table amount for approximately 30 months.

In *Koyama* v. *Leigh*,[271] the court, after reviewing the various "needless difficulties" created by the paying parent during litigation, ordered lump sum child support using the money being held in a maintenance security fund.

From a review of the case law, it appears that the practice of ordering lump sum payments is more common in cases where there are special expenses.[272]

AMENDMENT

This section has not been amended.

RECOMMENDATION

No amendments to this section are recommended.

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[270] *M.R., supra* note 267.

[271] *Koyama* v. *Leigh* (26 January 2001), Vancouver D093103, [2001] B.C.J. No. 154 (S.C.).

[272] See *Greenwood* v. *Greenwood* (1998), 37 R.F.L. (4th) 422 (B.C.S.C.); *Gibney, supra* note 266.

SECTION 12: SECURITY

BACKGROUND

This section lets the court order that the amount payable be secured or paid in a way specified by the court. This power existed in the *Divorce Act* before the *Federal Child Support Guidelines* were introduced.

Security

12. The court may require in the child support order that the amount payable under the order be paid or secured, or paid and secured, in the manner specified in the order.

APPLICATION

ISSUE

This section has generally been applied as intended.

CASE LAW

In *Davids*,[273] *Assinck* v. *Assinck*,[274] and *Lonergan* v. *Lonergan*,[275] the court ordered that child support be secured against various assets, including the matrimonial home, in case the paying parent defaulted.

AMENDMENT

This section has not been amended.

RECOMMENDATION

No amendments to this section are recommended.

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[273] *Davids*, *supra* note 92.

[274] *Assinck* v. *Assinck* (4 March 1998), Ontario 97-MP-231311, [1998] O.J. No. 875 (Ct. Just. (Gen. Div.)).

[275] *Lonergan* v. *Lonergan* (23 January 1998), Vancouver 98-11990, [1998] B.C.J. No. 150 (S.C.).

SECTION 13: INFORMATION TO BE SPECIFIED IN AN ORDER

BACKGROUND

This section specifically sets out what elements are to be included in a child support order. It ensures that the basic information used to determine the child support amount is included in the order. This information helps parties vary child support orders, as spouses know the various components that make up the child support amount.

Information to be specified in an order

13. A child support order must include the following information:

- (*a*) the name and birth date of each child to whom the order relates;
- (*b*) the income of any spouse whose income is used to determine the amount of the child support order;
- (*c*) the amount determined under paragraph 3(1)(*a*) for the number of children to whom the order relates;
- (*d*) the amount determined under paragraph 3(2)(*b*) for a child the age of majority or over;
- (*e*) the particulars of any expense described in subsection 7(1), the child to whom the expense relates, and the amount of the expense or, where that amount cannot be determined, the proportion to be paid in relation to the expense; and
- (*f*) the date on which the lump sum or first payment is payable and the day of the month or other time period on which all subsequent payments are to be made.

APPLICATION

ISSUE

Section 13 of the Guidelines is not always respected by those preparing child support orders. According to the Survey of Child Support Awards,[276] only 32 percent of cases contain all five items (see box below).

Paragraph 13(e) details the special or extraordinary expenses to be included in a court order. This paragraph indicates that a judge can include a *proportion* of a special expense rather than the amount in the court order, when the judge cannot determine the amount in advance. However, maintenance enforcement programs cannot enforce a proportion of an unknown amount. Also, section 7, which deals with special or extraordinary expenses, does not refer to a proportion of a special expense but to the actual amount of the expense.

Section 13 Compliance
Name of the child: 86.5 percent
Birth date of child: 84.2 percent
Income of spouse: 74.4 percent
Dates of payment: 73.7 percent
Table support amount: 52.5 percent

Source: Survey of Child Support Awards database, February 2001.

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[276] **Survey of Child Support Awards database, February 2001.**

CASE LAW

In *Lee* v. *Lee*,[277] the court stated that an order would not be void if it did not comply with section 13 of the Guidelines, if the required information was identified and available from materials in the court file.

In several cases, the courts have ordered a percentage of a special expense to be paid by the paying parent instead of specifying the exact amount.[278]

AMENDMENT

This section has not been amended.

RECOMMENDATION

No amendments to this section are recommended. Since 1997, compliance with section 13 has improved. As the legal profession begins varying orders determined under child support guidelines, the importance of respecting section 13 becomes all the more evident. As such, compliance continues to improve.

To help enforce the orders, parents and the court should continue to set out the amount of the special expense, and not just the proportion to be paid. To this end, a November 2000 amendment to section 7 allows parents and the court to estimate the amount of the special or extraordinary expense.

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[277] *Lee* v. *Lee* (1998), 167 Nfld. & P.E.I.R. 176, 43 R.F.L. (4th) 339 (Nfld. C.A.).

[278] See *Walkeden* v. *Zemlak* (1997), 160 Sask. R. 1, 33 R.F.L. (4th) 52 (Q.B.); *Di Pasquale* v. *Di Pasquale* (24 April 1998), Yellowknife 6101-02439, [1998] N.W.T.J. No. 58 (S.C.); *Chrones* v. *Scott* (1997), 160 Sask. R. 79, 33 R.F.L. (4th) 115 (Q.B.).

SECTION 14: CIRCUMSTANCES FOR VARIATION

BACKGROUND

Paragraph 17(1)(a) of the *Divorce Act* empowers the court to vary a child support order. Subsection 17(4) of the *Divorce Act* says that the court must first be satisfied that there has been "a change of circumstances, as provided for in the applicable guidelines." Section 14 of the Guidelines sets out what constitutes a change of circumstances.

Defining "a change of circumstances" helps parents and the courts decide whether an order should be varied. In particular, paragraph (c) helps parents who have a pre-Guidelines order to get a new child support amount under the Guidelines.

Circumstances for variation

14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

(*a*) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;

(*b*) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and

(*c*) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act, enacted by section 2 of chapter 1 of the Statutes of Canada (1997).

SOR/97-563, s. 2
SOR/2000-337, s. 2

APPLICATION

ISSUE

Courts have focused on paragraph 14(c) of the Guidelines and on interpreting the word *may* in subsection 17(1) of the *Divorce Act*.

CASE LAW

In one set of appellate decisions, the word *may* has been interpreted as giving the court discretion to make a variation order. Paragraph 14(c) has been treated solely as a "triggering mechanism." This allows a court to review the circumstances to see whether there is a sufficient change warranting a variation in child support payments and to review the reasonableness of the original order or settlement in light of the Guidelines.[279]

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[279] See *Wang*, *supra* note 51; *Sherman*, *supra* note 51; *Parent* v. *Pelletier* (1999), 219 N.B.R. (2d) 102, 1 R.F.L. (5th) 66 (C.A.) [hereinafter *Parent*]; *Laird* v. *Laird* (2000), 250 A.R. 193, 3 R.F.L. (5th) 241 (C.A.) [hereinafter *Laird*].

Another set of appellate decisions interprets the word *may* as empowering, giving the court the power to make a variation order. These decisions have seen paragraph 14(c) as a sufficient change in circumstances to require that all pre-guidelines orders be varied according to the Guidelines.[280] As a result, courts across the country apply paragraph 14(c) inconsistently.[281]

In *Montalbetti* v. *Montalbetti*,[282] a British Columbia Court of Appeal case decided after *Wang*, the court stated the following:

> In my opinion, the chambers judge was correct in concluding that there was a sufficient change in circumstances to warrant a variation. I say that quite apart from the provision in s. 14(c) of the Guidelines, which in itself may also have provided a foundation for the variation.[283]

Section 14 was amended twice (see explanation below) to address this. Since the last amendment in November 2000, court decisions have tended to view paragraph 14(c) as mandating a change to child support orders to ensure their compliance with the Guidelines.

In *O'Donnell* v. *Morgan*,[284] a New Brunswick case, the court recited the amended section 14. It concluded that the paying parent met the test in paragraph (c) and varied the order according to the Guidelines. In *Cholodniuk* v. *Sears*,[285] the paying parent sought to vary his child support obligation, determined before May 1, 1997, so that it complied with the Guidelines. The court stated the following:

> A previous application to vary this judgment was dismissed on February 11, 1999. Since that time however, s. 14 of the Guidelines has been amended to clarify that a child support order made prior to May 1, 1997, constitutes a change of circumstances that gives rise to the making of a variation order. As the order that Mr. Cholodniuk seeks to vary pre-dates May 1, 1997, he has met the threshold requirement for variation.[286]

In *Turner* v. *Turner*,[287] the court reviewed all of the relevant jurisprudence, articles written by various legal professionals, child support communications materials from the federal Department of Justice, and the amendments to paragraph 14(c). The court concluded that the coming into force of the Guidelines was a change in circumstances entitling a spouse to vary a pre-Guidelines child support order.

AMENDMENT

Section 14 has been amended twice since the Guidelines were implemented. In December 1997, section 14 was amended to clarify that only one of the listed circumstances in section 14 needs to be met in variation cases.[288]

In November 2000, section 14 was amended again.[289] In light of the conflicting appellate decisions from across the country, the section was amended to properly reflect its intent. All of the circumstances for variation listed in section 14, including paragraph (c), are changes in circumstances that a court can rely on to vary an order.

[280] See *Dergousoff*, supra note 82; *Bates, supra* note 51; *Vandal* v. *Droppo* (1999), 138 Man. R. (2d) 102, 2 R.F.L. (5th) 136 (C.A.).

[281] See the review of section 17 of the *Divorce Act* for a detailed explanation.

[282] *Montalbetti, supra* note 82.

[283] *Ibid.* at para. 16.

[284] *O'Donnell* v. *Morgan*, [2001] N.B.R. (2d) (Supp.) No. 4 (Q.B.) [hereinafter *O'Donnell*].

[285] *Cholodniuk* v. *Sears* (2001), 14 R.F.L. (5th) 9 (Sask. Q.B.) [hereinafter *Cholodniuk*].

[286] *Ibid.* at para. 3.

[287] *Turner* v. *Turner* (2000), 274 A.R. 124, 11 R.F.L. (5th) 411 (Q.B.) [hereinafter *Turner*].

[288] *Guidelines, supra* note 47.

[289] *Guidelines, supra* note 47.

Where there is such a change, for example as listed in paragraph (c), which refers to a situation in which an order was made before May 1, 1997, the intent is that the court vary the order and apply the *Federal Child Support Guidelines*. The Guidelines were designed to provide a fair standard of support for children in light of the parents' ability to contribute.

The court can decide not to apply the *Federal Child Support Guidelines* when parents have an agreement or order made before or after May 1, 1997 that includes a special provision that benefits the child. In this case, the court can take the agreement into account under subsection 17(6.2) of the *Divorce Act* and decline to vary the order, since the Guidelines amount might not be appropriate in that situation.

RECOMMENDATION

No amendments to this section are recommended. As time passes, child support orders made before May 1, 1997 will become virtually non-existent and, eventually, paragraph 14(c) will be repealed. Also, since the November 2000 amendment, the lower courts in at least two provinces (Alberta and New Brunswick) are now ruling that the coming into force of the Guidelines is sufficient grounds to warrant a variation, despite earlier rulings to the contrary.

In addition, some legal observers agree that the amendments have clarified that the coming into force of the Guidelines is sufficient on its own to warrant a variation. As one such observer put it:

> ***For the first three years in which the Guidelines were in force, there was disagreement at the appeal court level on whether s. 14(c) of the Guidelines mandated that all pre-Guidelines orders be converted into Guidelines-based orders. The amendments to s. 14 make it clear that the coming into force of the Guidelines is, standing alone, a change of circumstances [that] entitles the courts to vary pre-Guidelines orders.***[290]

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[290] **Hainsworth, T.W., *Child Support Guidelines Service*, Canada Law Book Inc., Release No. 8, November 2001, p. 65 [hereinafter *Hainsworth*].**

SECTION 15: DETERMINATION OF ANNUAL INCOME

BACKGROUND

Section 15 of the Guidelines not only provides the starting point for calculating income; it also gives spouses an opportunity to agree on the amount of their income. This reduces conflict and tension between spouses and encourages efficient settlements. However, the court must be satisfied that the amount agreed upon by the spouses is reasonable. The court's approval is required to ensure consistent treatment of spouses and children who are in similar circumstances and to establish a fair standard of support for the children.

Determination of annual income

15.(1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

Agreement

(2) Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.

APPLICATION

ISSUE

No contentious issues have arisen as a result of this section.

CASE LAW

In the case of *Robillard-Cole* v. *Cole*,[291] the court confirmed that subsection 15(2) of the Guidelines allows the spouses to agree in writing on the annual income of a spouse. The court is not bound by this agreement and may review the spouse's income in light of the income information provided under section 21 of the Guidelines. In the Ontario Court of Appeal case *Wheeler* v. *Wheeler*,[292] the court decided that if both parents agree on the income amount of the paying parent, that should be the income used to determine the child support amount.

AMENDMENT

There have been no amendments to this section.

RECOMMENDATION

No amendments to this section are recommended.

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[291] ***Robillard-Cole* v. *Cole* (2000), 183 N.S.R. (2d) 176, 568 A.P.R. 176 (N.S.S.C.).**

[292] ***Wheeler* v. *Wheeler* (16 December 2000), Toronto M26050, [2000] O.J. No. 4759 (Ont. C.A.).**

SECTION 16: CALCULATION OF ANNUAL INCOME

BACKGROUND

Section 16 of the Guidelines says that a spouse's annual income is determined using the sources of income listed under "Total income" on the T1 General form issued by the Canada Customs and Revenue Agency (CCRA). This amount is then adjusted according to the rules set out in Schedule III of the Guidelines.

In practice, this means that the first step in calculating a spouse's annual income is to get his or her most recent federal income tax return. The "Total income" figure on line 150 includes income from all sources, including employment income, pension income, interest and dividend income, business or professional income, and employment insurance and social assistance payments. For each of these identified sources, the amount of income must be determined using the most current information available as specified in subsection 2(3) of the Guidelines.

> **Calculation of annual income**
>
> **16.** Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III.
>
> *SOR/2000-337, s. 3*

In some cases, the spouse's most recent federal tax return will provide the most recent information. However, in other cases, the most recent federal tax return and the CCRA notice of assessment and reassessment may not be the best sources for current information. For example, the income tax information may not be up to date, accurate, or a fair reflection of income, especially if a spouse's income has recently changed significantly. In these cases, one must use more current sources of information, such as pay stubs or other income records.

The spouse's income from all sources may have to be adjusted according to Schedule III of the Guidelines to further determine the income actually available for calculating child support. So income under the *Income Tax Act* is not necessarily the same as income for child support purposes.

APPLICATION

ISSUES

PAST OR FUTURE INCOME?

At first, some people were confused about whether Guidelines income was based on past income, perhaps as found in an income tax return, or on projected income. As more case law interpreted the Guidelines, a clear direction emerged. For the most part, the courts are not determining current income on the basis of a preceding year's tax return, but rather by reference to the sources of income found in the T1 General form. This trend is reinforced by subsection 2(3), which directs the courts to use the most current income information, as well as by paragraph 21(1)(c), which requires a spouse to file his or her most recent statement of earnings.

ANNUAL INCOME

A related issue is the definition of *annual income*. Does the word *annual* refer to the current calendar year or to the next 12 months?

CASE LAW

PAST OR FUTURE INCOME?

The leading case is *Lee* v. *Lee*,[293] wherein the Newfoundland Court of Appeal made the following statements:

> Support must be paid out of the future income of the payor-spouse. The underlying rationale is still ability to pay. In that sense, the process of setting child support is a prospective one. In engaging in that predictive exercise, however, historical data is obviously important and usually provides the best forecast of current ability to pay.
>
> Subsection 2(3) of the Guidelines supports the foregoing analysis inferentially since it requires the use of "the most current information" in the determination of any amounts for the purposes of the Guidelines.
>
> Section 16 merely provides that the "sources" of income used for calculating income for the purposes of support shall be consistent with the sources used for calculating income subject to taxation. It is the categories of income, not their historical amounts, [that] must be determined by reference to income tax concepts.

ANNUAL INCOME

Case law is divided on the definition of *annual*. In several cases, the courts based a party's annual income on the most current information, saying that annual income is from the calendar year in which the application is heard.[294] Other cases say that annual income is income to be earned in the 12 months following the application.[295]

AMENDMENT

Section 16 was amended on November 1, 2000, because Revenue Canada had changed its name to the Canada Customs and Revenue Agency.[296]

RECOMMENDATION

No amendment to this section is recommended. With regard to what annual income means, the Guidelines have the built-in flexibility to allow a definition that is "time appropriate" to the situation. If child support is being determined for a period that precedes the hearing of the application, then annual income relates to the time for which the child support amount is being calculated and ordered. If the child support amount calculated and ordered is for a period after the hearing, then annual income reflects that time period.

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[293] *Lee* v. *Lee* (1998), 167 Nfld. & P.E.I.R. 176, 513 A.P.R. 176, 165 D.L.R. (4th) 619, 43 R.F.L. (4th) 339 at paras. 4, 6, 8 (Nfld. C.A.) [hereinafter *Lee* cited to Nfld. & P.E.I.R.].

[294] *Fuzi* v. *Fuzi* (1999), 92 A.C.W.S. (3d) 102 (B.C.S.C.); *de Goede* v. *de Goede* (2000), 93 A.C.W.S. (3d) (B.C.S.C.).

[295] *Odendahl* v. *Brule* (1999), 45 R.F.L. (4th) 37 (Ont. Gen. Div.); *Forbes* v. *Forbes* (1998), 79 A.C.W.S. (3d) 1225 (B.C.S.C.).

[296] *Guidelines, supra* note 47, s. 3.

SECTION 17: PATTERN OF INCOME

BACKGROUND

Under subsection 17(1), the court may select an amount of income that, in its view, would be a fairer amount than the most recent income information. The court reviews the paying parent's annual income over three years to identify trends, fluctuations, and non-recurring items, then adjusts the income amount. There is no formula for this; the court does what is appropriate.

Pattern of income

17.(1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

SOR/2000-337, s. 4

Non-recurring losses

(2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

Where a spouse has a non-recurring capital or business investment loss, under subsection 17(2), the court may adjust the income amount of the loss to reflect a more appropriate amount.

Under the *Income Tax Act* there are limitations and restrictions affecting the deduction of capital and business investment losses. Sections 6 and 7 of Schedule III of the Guidelines[297] change the treatment of these losses so the full net capital gain or the full business investment loss (not just the taxable portion permitted by the *Income Tax Act*) is included in determining annual income for Guidelines purposes.

In determining a spouse's annual income the court may adjust the amount of a capital or business investment loss without applying the amounts determined by sections 6 and 7 of Schedule III. The court may adjust the amount of these losses and therefore neutralize the effect of a one-time loss. This is consistent with the Guidelines objective of determining annual income as fairly as possible. The court may adjust the amount of the loss and any related expenses, including carrying charges and interest expenses, as it considers appropriate.

Section 17 gives the courts flexibility and discretion in determining income in cases where the strict rules would create an unfair result that does not truly reflect a person's income.

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[297] **See the reviews of sections 6 and 7 of Schedule III.**

APPLICATION

ISSUE

Section 17 raises several issues not necessarily related to how the section is interpreted, but to how the section is applied in relation to the facts of any given case. Examples include whether overtime income should be included in Guidelines income, whether income that historically fluctuates (such as farming income, fishing income, and real estate income) should be averaged out over more than one year, and what amount from a non-recurring source of income should be included in Guidelines income. With so many variables, the Guidelines cannot address every possible income scenario. They can only provide general rules courts can use to decide on the fairest income amount, given the evidence and circumstances.

CASE LAW

The Court of Appeal case of *Lee*[298] explained, "Neither does s. 17 of the Guidelines indicate … that the court is required to base its income calculations on past income levels." The Court added, "These are convenient shorthand methodological rules to enable a fair prediction of current income to be determined."

In *Wilson* v. *Wilson*,[299] a farming income case, the court decided not to rely too heavily on section 17 since the objective is to determine, based on the circumstances before the court, the fairest indicator of a person's income. The court went on to say that averaging the most recent three years of available information accounts somewhat for fluctuations that can occur from year to year.

In *Pederson* v. *Walker*,[300] the court held that a portion of the lump sum severance payment the paying parent received should be attributed to the income stream of all future years while the children were still dependent. In *Holtby* v. *Holtby*[301] and *Hart* v. *Hart*,[302] the court did not include a one-time RRSP withdrawal in income.

The courts have generally applied subsection 17(2) as intended. In the Saskatchewan case of *Kuntz* v. *Kuntz*,[303] the court found that, since the objective was to find the fairest indicator of current income, when somebody tries to use business losses to substantially reduce income, that person must completely explain the losses. The court went on to say that losses and expenses unrelated to earning income, as a general rule, should not be used to reduce income.

In *Omah-Maharajh* v. *Howard*,[304] the court did not allow a deduction from the father's income for his allowable business investment loss of $75,000. The court felt that if it permitted the deduction, it would be understating the father's ability to pay child support. However, the court allowed him to deduct the annual loan repayment on money he borrowed to make the investment, as this did reflect his income.

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[298] **_Lee, supra_ note 293 at para. 9.**

[299] **_Wilson_ v. _Wilson_ (1998), 165 Sask. R. 241, [1998] 8 W.W.R. 493 (Q.B.) [hereinafter _Wilson_].**

[300] **_Pederson_ v. _Walker_ (1998), 167 Sask. R. 127 (Q.B.).**

[301] **_Holtby, supra_ note 192.**

[302] **_Hart_ v. _Hart_ (10 November 1997), Regina 016637, [1999] S.J. No. 640 (Sask. Q.B.). See also _Arnold_ v. _Washburn_ [2001] O.J. No. 4996, Docket No. C35085, December 19, 2001, where the Ontario Court of Appeal concluded that substantial proceeds from the sale of shares in 1993 do not change the support payer's Guidelines income.**

[303] **_Kuntz_ v. _Kuntz_ (1998), 173 Sask. R. 149 (Q.B.).**

[304] **_Omah-Maharajh_ v. _Howard_ (1998), 58 Alta. L.R. (3d) 236, 215 A.R. 159. [hereinfater _Omah-Maharajh_ cited to Alta. L.R.] (Q.B.).**

AMENDMENT

The initial wording of subsection 17(1) was long and cumbersome, sometimes requiring courts to go through unnecessary mental gymnastics. There was also some redundancy and excess wording. Although the courts were, for the most part, applying subsection 17(1) as intended, the subsection was amended to make it even easier to apply.[305]

Subsection 17(1) was amended on November 1, 2000. It was reworded to clarify that the court should only consider past income when the income amount determined under section 16 would be unfair. The rewording also clarified that, when determining the income amount, the court should consider a parent's pattern of income, or fluctuations in income, or the receipt of a non-recurring amount.

The former paragraph (a) of subsection 17(1) was removed because it was redundant when read with section 16. Section 16 and subsection 2(3) set out the criteria for determining income when a parent's income is increasing or decreasing steadily. The annual income is determined using the most recent information.

The reference to a "source" of income, which is also found in section 16, was also removed. Under section 16, the court will determine income using the "sources" of income set out in the T1 General form issued by the Canada Customs and Revenue Agency. Section 17 applies to cases where the amount determined under section 16 is not fair. Therefore, the reference to "sources" in section 17 was unnecessary.

Paragraphs (b) and (c) were collapsed into subsection 17(1), without affecting how 17(1) is applied. The section was simply streamlined to make it easier to use.

RECOMMENDATION

No amendment to this section is recommended.

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[305] ***Guidelines*, *supra*** **note 47, s. 4.**

SECTION 18: SHAREHOLDER, DIRECTOR, OR OFFICER

BACKGROUND

When a spouse is a shareholder, director, or officer of a corporation, the court can select an amount of pre-tax business income to use to determine annual income. This can be fairer than simply accepting the total income as shown on the spouse's most recent income tax return, even when that income is adjusted in accordance with Schedule III.

The court can decide how much corporate income, if any, is the shareholder's in light of paragraphs (a) and (b).

Under subsection 18(2), the pre-tax income of the corporation must be adjusted for any unreasonable payments (such as salaries, wages, or management fees) made to people not at arm's length.

Shareholder, director or officer

18.(1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

(*a*) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(*b*) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

APPLICATION

ISSUE

Subsection 18(1) raises a range of issues:

ATTRIBUTION OF CORPORATE INCOME

When and by how much should retained earnings be encroached under paragraph 18(1)(a)? When retained earnings are added to Guidelines income one year, how does one avoid double dipping if the retained earnings are paid out in a subsequent year?

SHAREHOLDER LOANS

How should courts treat the repayment of shareholder loans from the company to the paying parent?

GROSS-UP

Should income attributed under section 18 be grossed up, since it is net of taxes? This issue is discussed in further detail under section 19 of the Guidelines.

Courts use their discretion to address all of these issues under case law, given the facts and evidence.

CASE LAW

ATTRIBUTION OF CORPORATE INCOME

Initially, several cases showed that courts were reluctant to attribute corporate income to a shareholder. In *Beeching* v. *Beeching,*[306] the court concluded that the profits of a corporation belong to the corporation, until they are declared as dividends, because directors decide how to declare dividends. As the court pointed out, that power is fiduciary in nature and must be exercised in good faith and in the best interests of the company. Moreover, the court was of the opinion that where other arm's length shareholders are involved, the court should hesitate to interfere with the management of the corporation.

In *S.(L.)* v. *P.(E.),*[307] the court held that the section 18 adjustments should be made sparingly. According to the court, section 18 should only be used when there is evidence that a spouse is structuring compensation to reduce support obligations or when the company is subsidizing the parent's personal expenses through corporate disbursements.

Similarly, in *Kelly* v. *Kelly,*[308] the court held that subsection 18(1) does not require that all of the net income be paid out as dividends and that the retained earnings be severely restricted in every instance involving a corporation. In *Kelly*, the court declined to attribute the balance of the corporate income to the spouse because most of the corporate profits were paid out as dividends.

However, in recent years, the courts have expanded their approach in these cases. In *Baum* v. *Baum*[309] and *Stephen* v. *Stephen,*[310] the court interpreted section 18 liberally, stating that it pierces the corporate veil and ensures that the spouse's income includes all the income available for child support.

In *Giene* v. *Giene,*[311] the father owned 51 percent of the company and his second spouse, who paid market value for the shares, owned 49 percent of the company. The court therefore attributed 51 percent of the corporate profits to the husband when determining his income.

When assessing whether to attribute corporate income to a shareholder, a court will generally consider the following factors set out in *Rudulier* v. *Rudulier*[312] and in *Beeching*:[313]

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[306] *Beeching* v. *Beeching* 1998, 169 Sask. R. 18, 46 R.F.L. (4th) 15 (Q.B.) [hereinafter *Beeching* cited to Sask. R.].

[307] *S.(L.)* v. *P.(E.)* (1997), 41 B.C.L.R. (3d) 14, 32 R.F.L. (4th) 75 (B.C.S.C.), aff'd 50 R.F.L. (4th) 302, [1999] 12 W.W.R. 718 (B.C.C.A.), leave to appeal to S.C.C. refused [1999]179 D.L.R. (4th) vii [hereinafter *S.(L.)* cited to B.C.L.R.].

[308] *Kelly* v. *Kelly* (1997), 162 Sask. R. 74, 33 R.F.L. (4th) 16 (Q.B.) [hereinafter *Kelly* cited to Sask. R.].

[309] *Baum* v. *Baum* (1999), 182 D.L.R. (4th) 715 (B.C.S.C.).

[310] *Stephen* v. *Stephen* (1999), 183 Sask. R. 161 (Q.B.).

[311] *Giene* v. *Giene* (1998), 234, A.R. 355 (Q.B.).

[312] *Rudulier* v. *Rudulier* 1999 182 Sask. R. 23 (Q.B.) at para. 44.

[313] *Beeching* , *supra* note 306.

- the nature of the corporation's business (for example, a consulting business, which is not capital intensive, is less likely to require its profits to be reinvested and more likely to be in a position to distribute these profits to its shareholders),
- the internal structure and ownership of the corporation (for example, when other arm's length shareholders are involved, the court will be hesitant to interfere with the management of the corporation),
- the financial status of the corporation (for example, a financially weak business is more likely to reinvest its profits to fund working capital requirements and future growth), and
- the historical practice of the corporation (for example, a corporation may have historically reinvested its excess income rather than distributing it to its shareholders).

When a spouse is the sole shareholder of a company, courts are less reluctant to look through the corporate structure and attribute the pre-tax income of the corporation to the spouse.[314] In *Desjardins* v. *Desjardins*,[315] the court imputed half the pre-tax income of the corporation to the husband. The husband was the sole shareholder of a consulting company. He was also the only consultant and withdrew substantial employment income from the corporation. The court held that the adjusted income better reflected what Mr. Desjardins would have earned if he had not incorporated the business.

In *Blackburn* v. *Elmitt*,[316] the husband was a dentist who carried on his practice through a professional corporation that employed him. The court held that the net revenues of the company plus a salary paid to him represented the true value of his services to the company.

SHAREHOLDER LOANS

Several cases address the repayment of shareholder loans. In *Beeching*, the court decided that a shareholder's loan repaid to a paying parent is not income, either under the *Income Tax Act* or under the Guidelines. In *Rudachyk*,[317] the court also held that the repayment of a shareholder's loan is not income. The court did go on to say that payments on a shareholder loan under an interest-free note may be viewed as establishing an unproductive asset. In such cases, income may be imputed under paragraph 19(1)(e). Also, if a shareholder spouse receives the loan payment in lieu of income, income may be imputed under paragraphs 19(1)(a) and (d):

> It would be an abuse if the wage was kept unreasonably low and the cash available to [the paying parent] was augmented during the critical years of support by payments on the shareholder loan. In such a circumstance, where it seemed appropriate, it would be open to a judge to employ the broad discretionary authority available in the following section of the Guidelines (paragraphs 19(1)(a) and (d)) to assess a more realistic level of income.

GROSS-UP

In several cases,[318] the courts found cases where a spouse arranged his or her affairs to pay substantially less income tax. Despite the spouse's ability to deduct expenses for income tax purposes, the expenses were found in fact to be personal and hence were imputed back into the spouse's income. In these cases, the income must be "grossed up" before applying the table.

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[314] ***Rudachyk* v. *Rudachyk* (1999) 180 Sask. R. 73, 47 R.F.L. (4th) 363 at para. 23 (Sask. C.A.) [hereinafter *Rudachyk*].**

[315] ***Desjardins* v. *Desjardins* (1998), 79 A.C.W.S. (3d) 773 (B.C.S.C.).**

[316] ***Blackburn* v. *Elmitt* (1997), 34 R.F.L. (4th) 183 (B.C.S.C.).**

[317] ***Rudachyk, supra* note 314 at para. 25.**

[318] ***Orser* v. *Grant* (2000), 12 R.F.L. (5th) 184 (Ont. Div. Crt.); *Sarafinchin* v. *Sarafinchin* (2000), 189 D.L.R. (4th) 741 (Ont. Sup. Crt. Just.); *Moran* v. *Cook* (2000), 9 R.F.L. (5th) 352 (Ont. Sup. Crt. Just.).**

The case law interpreting subsection 18(2) is fairly consistent and does not raise any difficult issues. In the case of *S.(L.)*,[319] the court decided that subsection 18(2) of the Guidelines placed the onus on the defendant to prove the reasonableness of salaries paid to people not at arm's length. This onus arises after the plaintiff has made out a *prima facie* case of unreasonableness.

AMENDMENT

There have been no amendments to this section.

RECOMMENDATION

No amendments to section 18 are recommended.

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[319] ***S.(L.)*, *supra* note 307.**

SECTION 19: IMPUTING INCOME

BACKGROUND

Section 19 gives the court a mechanism for imputing income. Subsection 19(1) includes a non-exhaustive list of nine circumstances under which the court may impute income. These include the most common situations where income is hidden, diverted, unreported, or otherwise unavailable for legitimate reasons.

Subsection 19(2) confirms that an expense deduction is not necessarily reasonable just because it is permitted under the *Income Tax Act*.

Imputing income

19.(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(*a*) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

(*b*) the spouse is exempt from paying federal or provincial income tax;

(*c*) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

(*d*) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

(*e*) the spouse's property is not reasonably utilized to generate income;

(*f*) the spouse has failed to provide income information when under a legal obligation to do so;

(*g*) the spouse unreasonably deducts expenses from income;

(*h*) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

(*i*) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

SOR/2000-337, s. 5

Reasonableness of Expense

(2) For the purpose of paragraph (1)(*g*), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*.

APPLICATION

ISSUE

As with section 18, which allows a court to impute income when a spouse is a shareholder, officer, or director of a corporation, the "gross-up" question is also raised under section 19. When income is imputed in net dollars, courts have asked whether those net dollars should be grossed up to reflect a gross income, since the child support tables are based on gross income.

As with other sections of the Guidelines that give the court discretion to choose an amount, this inevitably leads to inconsistencies.

CASE LAW

Courts have not hesitated to impute income under section 19. In fact, there is a plethora of cases under this section.

The following are among the general principles that apply in section 19 cases:

- any other circumstances raised to impute income must be like those already listed;[320]
- evidence must substantiate the claim for imputing income; and[321]
- the person claiming that income should be imputed must bear the burden of proof. [322]

As with section 18 cases, courts generally, when imputing income, gross up the imputed amount to account for taxes. For example, in *Ewaniw* v. *Ewaniw*,[323] the court imputed income to a father who had not filed an income tax return in seven years and who had acknowledged getting money "under the table" from various sources. The court grossed up the imputed income by 25 percent because no tax had been paid on it.

AMENDMENT

Paragraph 19(1)(h) was amended on November 1, 2000, to clarify that income can also be imputed from such tax-exempt income sources as workers' compensation benefits or disability benefits from a private insurer.[324]

RECOMMENDATION

No amendment to this section is recommended. Section 19 is one of the most litigated areas of the Federal Child Support Guidelines because these cases are contentious, not because of any deficiencies in the law. Courts consistently look at various fact patterns and determine whether income should be imputed. A change to section 19 would likely not reduce this type of litigation.

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[320] *Risen* v. *Risen* (1998), 78 O.T.C. 189, 81 A.C.W.S. (3d) 669 (Ont. Gen. Div.).

[321] *Vivier* v. *Vivier* (1997), 120 Man. R. (2d) 231 (Q.B.); *Laraque* v. *Allooloo* (1999), 48 R.F.L. (4th) 381 (N.W.T.S.C.) [hereinafter *Laraque*].

[322] *Lessard* v. *Lessard* (1999), 242 A.R. 363 (Q.B.).

[323] *Ewaniw* v. *Ewaniw* (1998), 224 A.R. 301, 41 R.F.L. (4th) 94 (Alta. Q.B.).

[324] *Guidelines, supra* note 47, s. 5.

SECTION 20: NON-RESIDENT

BACKGROUND

This section ensures that a spouse's income properly reflects the amount that would be available if that spouse resided in Canada.

Non-resident

20. Where a spouse is a non-resident of Canada, the spouse's annual income is determined as though the spouse were a resident of Canada.

APPLICATION

ISSUE

Section 20 has been applied consistently and as intended. Section 19 allows a court to impute income when a paying parent lives in a country with lower effective income tax rates, but there is no equivalent provision for paying parents living in countries with higher effective tax rates.

CASE LAW

Little case law has interpreted section 20. In *Fibiger* v. *Fibiger,*[325] the court said the Guidelines allowed it to convert foreign currency and to then apply the Guidelines tables. In *Williams* v. *Williams,*[326] the Newfoundland Court of Appeal determined the income of a father living outside Canada by converting the foreign income into Canadian income. The court did not compare Canada's cost of living or tax structure to that of the country where the father lived.

In *Schmid* v. *Smith,*[327] the court said that section 20 does not address the inequities that may arise from higher taxes or a higher cost of living in a foreign jurisdiction. Any such issues should be addressed either under paragraph 19(1)(c) (imputing income) or section 10 (undue hardship).

AMENDMENT

There has been no amendment to this section.

RECOMMENDATION

This section should be amended to recognize that some parents live in countries with higher effective income tax rates than Canada's.

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[325] ***Fibiger*** **v. *Fibiger* (1998), 38 R.F.L. (4th) 258 (B.C.S.C.).**

[326] ***Williams*** **v. *Williams* (1999), 179 Nfld. & P.E.I.R. 283, 50 R.F.L. (4th) 446 (Nfld. C.A.).**

[327] ***Schmid, supra*****, note 230.**

SECTION 21: OBLIGATION OF APPLICANT

Obligation of applicant

21.(1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:

- (*a*) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;
- (*b*) a copy of every notice of assessment and reassessment issued to the spouse for each of the three most recent taxation years;
- (*c*) where the spouse is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime or, where such a statement is not provided by the employer, a letter from the spouse's employer setting out that information including the spouse's rate of annual salary or remuneration;
- (*d*) where the spouse is self-employed, for the three most recent taxation years
  - (i) the financial statements of the spouse's business or professional practice, other than a partnership, and
  - (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length;
- (*e*) where the spouse is a partner in a partnership, confirmation of the spouse's income and draw from, and capital in, the partnership for its three most recent taxation years;

SOR/2000-337, s.6(1),(2)

BACKGROUND

In child support and financial settlements, it has always been hard to get accurate and current financial information about the paying parent. Guidelines cannot be applied accurately without a complete financial picture of the paying parent and, where certain expenses are to be divided proportionately, of the receiving parent. Section 21 ensures that parents disclose the relevant financial information.

APPLICATION

ISSUES

Initially, many people felt that the disclosure requirements in the Guidelines were unfair because the receiving parent usually does not have to disclose information.[328]

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[328] See *Formula for the Table of Amounts Contained in the* Federal Child Support Guidelines*: A Technical Report* (Ottawa: Department of Justice, CSR-1997-1E, 1997).

Since then, many have come to realize that the disclosure requirements are fair and reduce the procedural burden. In 1999, as part of the federal Department of Justice's consultations on technical issues asked[329]: "Should the Guidelines require the receiving parent to disclose income information to the other parent in all cases?" Less than half the respondents said that this was a significant concern. Other questions about section 21 disclosures were also asked in that document.[330]

Under the Guidelines, the recipient spouse must disclose income in many cases, such as when he or she seeks special expenses, or when one of the parties is claiming undue hardship under subsection 21(3), or when the income of the paying parent is over $150,000, under subsection 21(4).

> Quebec uses the income of both parents to calculate the child support amount. However, a review of its *Report to Parliament* reveals the following:
>
> According to the *Rapport du Comité de suivi du modèle québécois de fixation des pensions alimentaires pour enfants*, in 50 percent of cases studied by the Committee one parent assumes all of the financial responsibility for a child because the other parent does not have available "income."

> **21.**(1)...
> (*f*) where the spouse controls a corporation, for its three most recent taxation years
> - (i) the financial statements of the corporation and its subsidiaries, and
> - (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;
>
> (*g*) where the spouse is a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust's three most recent financial statements; and
> (*h*) in addition to any income information that must be included under paragraphs (*c*) to (*g*), where the spouse receives income from employment insurance, social assistance, a pension, workers' compensation, disability payments or any other source, the most recent statement of income indicating the total amount of income from the applicable source during the current year, or if such a statement is not provided, a letter from the appropriate authority stating the required information.
>
> *SOR/2000-337, s.6(1), (2)*

Under paragraph 21(1)(f), a spouse who controls a corporation must disclose that corporation's financial information. Some case law has asked what *controls a corporation* means. Does it mean the legal power to manage a corporation (*de jure* control) or does it mean the potential influence that a person may have, directly or indirectly, over the affairs of the corporation (*de facto* control)?

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[329] **Federal Child Support Guidelines: *A Review of Technical Issues and Proposed Solutions.***
[330] ***Ibid.***

21.(1)...

Obligation of respondent

(2) A spouse who is served with an application for a child support order and whose income information is necessary to determine the amount of the order, must, within 30 days after the application is served if the spouse resides in Canada or the United States or within 60 days if the spouse resides elsewhere, or such other time limit as the court specifies, provide the court, as well as the other spouse or the order assignee, as the case may be, with the documents referred to in subsection (1).

Special expenses or undue hardship

(3) Where, in the course of proceedings in respect of an application for a child support order, a spouse requests an amount to cover expenses referred to in subsection 7(1) or pleads undue hardship, the spouse who would be receiving the amount of child support must, within 30 days after the amount is sought or undue hardship is pleaded if the spouse resides in Canada or the United States or within 60 days if the spouse resides elsewhere, or such other time limit as the court specifies, provide the court and the other spouse with the documents referred to in subsection (1).

Income over $150,000

(4) Where, in the course of proceedings in respect of an application for a child support order, it is established that the income of the spouse who would be paying the amount of child support is greater than $150,000, the other spouse must, within 30 days after the income is established to be greater than $150,000 if the other spouse resides in Canada or the United States or within 60 days if the other spouse resides elsewhere, or such other time limit as the court specifies, provide the court and the spouse with the documents referred to in subsection (1).

Making of rules not precluded

(5) Nothing in this section precludes the making of rules by a competent authority, within the meaning of section 25 of the Act, respecting the disclosure of income information that is considered necessary for the purposes of the determination of an amount of a child support order.

CASE LAW

In *Gray* v. *Gray*,[331] the court confirmed that section 21 of the Guidelines requires that a spouse applying for child support file income information only when necessary to determine the amount of the order in the following situations:

- a child has become an adult;
- the paying spouse's income exceeds $150,000;
- the paying parent is a step-parent;
- a claim is made for special or extraordinary expenses ("add-ons") under section 7 of the Federal *Child Support Guidelines*;
- each spouse has custody of one or more children of the marriage ("split custody");
- each spouse has the child not less than 40 percent of the time ("shared custody"); or
- one spouse seeks to invoke the "undue hardship" provision in section 10 of the *Federal Child Support Guidelines.*

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[331] *Gray* v. *Gray* (1997), 33 R.F.L. (4th) 273 (Ont. Ct. (Gen. Div.)).

In *Cuddie* v. *Cuddie*,[332] the father claimed undue hardship and sought disclosure of income from the mother. The mother resisted disclosure because she had already conceded her household income was higher than the father's. The court held that the mother had to disclose because it needed a precise financial picture of the recipient's household to decide by how much to reduce the support. The court added:

> Counsel for [the mother] conceded that in the absence of the Guidelines legislation, she would have to disclose as requested. It seems a curious result to interpret legislation that is intended to address the needs of children in this restrictive way. Surely the intent is for more disclosure, not less.[333]

In the Nova Scotia Court of Appeal case of *Wilcox* v. *Snow*,[334] the Court said that the father, a self-employed businessperson, must do more than file an income tax return to show enough of a change of circumstances to warrant a variation. In the case, the father had filed only 1997 and 1998 income tax returns and comparative income and expense statements for those two years. He had not filed all of the financial information required by subsection 21(1) of the Guidelines.

The case law on the meaning of *controls a corporation* has been inconsistent. In *Goerlitz* v. *Paquette*,[335] the court, in a side statement, said that the phrase should be interpreted as meaning *has a controlling interest in a corporation*. The court declined to order a spouse to disclose corporate information where she was a director but her live-in partner was the sole shareholder. The court in *Fielding* v. *Fielding*[336] adopted the same approach, holding that paragraph 21(1)(f) only required income disclosure in *de jure* situations: when the respondent, with a third party, jointly controlled the corporation, no disclosure was necessary, as the respondent did not control the company.

In these jurisdictions, only the income of the paying parent is used to calculate the basic child support amount:[1]

- France
- Germany
- Norway
- United Kingdom
- New Zealand
- US states using the percentage of income standard model

The income of both parents is considered in these jurisdictions:

- Quebec
- Australia (only recipient parent's income over A$31,351 is considered)
- US states using the income shares model or the Melson/Delaware child support formula

[1] *Child Support Schemes: Australia and Comparisons*. Australia: Client Research Unit, Child Support Agency, March 2001.

On the other hand, in *Weldon* v. *Weldon*,[337] the court ordered the father to disclose income information of corporations in which he held less than half of the shares.

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[332] *Cuddie* v. *Cuddie* (13 January 1998), New Westminster D039031, [1998] B.C.J. No. 159 (S.C.) [hereinafter *Cuddie*].

[333] *Ibid.* at para. 13.

[334] *Wilcox* v. *Snow* (1999), 181 N.S.R. (2d) 92, 3 R.F.L. (5th) 171 (C.A.) [hereinafter *Wilcox*].

[335] *Goerlitz* v. *Paquette* (1998), 221 A.R. 182 (Q.B.).

[336] *Fielding* v. *Fielding* (1999), 45 R.F.L. (4th) 24 (Ont. Ct. (Gen. Div.)), leave to appeal refused (1999), 45 R.F.L. (4th) 29 (Ont. Div. Ct.) [hereinafter *Fielding*].

[337] *Weldon* v. *Weldon* (25 August 2000), Ontario FD560/00, [2000] O.J. No. 3239 (Sup. Ct. Just.).

However, in some cases, the courts have ordered the disclosure of corporate documents that would not otherwise be disclosed under paragraph 21(1)(f). To do this, they have used provincial rules or general discretion under sections 17 and 18 of the Guidelines.[338]

In the Manitoba Court of Appeal case of *Bates* v. *Welcher*,[339] the Court reviewed the jurisprudence interpreting *control* and concluded the following:

> [T]he word *control* in this subsection refers to *de jure* control. The jurisprudence under the *Income Tax Act* and the cases of *Goerlitz* and *Fielding* clearly leads to the conclusion that the word *control* as used in s. 20(2)(g) of the Manitoba guidelines and s. 21(1)(f) of the federal guidelines refers to majority ownership control.[340]

However, the Court went on to say that it had residual discretion under the Guidelines to order the disclosure of relevant financial information:

> [F]inancial disclosure is by its nature an invasive process. There must be a balancing of the interests of all parties and that balancing is accomplished by requiring the applicant to satisfy the court that the information requested is relevant and reasonably necessary to the facts as opposed to a fishing expedition.[341]

AMENDMENT

Section 21 was amended on November 1, 2000, as follows:

PARAGRAPH 21(1)(B)

The paragraph was amended by changing the word *or* to *and*. This clarified that both the notice of assessment *and*, if issued, reassessment are required.[342]

PARAGRAPH 21(1)(H)

Several documents were added to the list of items that must be disclosed in child support cases. This helped parents and the court determine income by providing them with information not necessarily disclosed in the other income documents listed in subsection 21(1).[343]

RECOMMENDATION

In support cases, the disclosure of income information is crucial. Generally, section 21 has been applied liberally and in keeping with the objectives set out in section 1 of the Guidelines. It is recommended that section 21 not be amended.

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[338] See *Pastway* v. *Pastway* (8 May 1999), Kitchener 31010/99 (Sup. Ct. Just.); *Fielding, supra* note 336.

[339] *Bates* v. *Welcher* (27 February 2001), Manitoba AF00-30-04559, [2001] MBCA 33 (C.A.).

[340] *Ibid.* at para. 55.

[341] *Ibid.* at para. 63.

[342] *Guidelines*, *supra* note 47, s. 6(1).

[343] *Guidelines*, *supra* note 47, s. 6(2).

SECTION 22: FAILURE TO COMPLY

BACKGROUND

When a spouse fails to disclose the income information set out in section 21, the court may order financial and other relief to the other spouse.

The requesting spouse may ask for the matter to proceed or for an order requiring the other spouse to produce the documents. When the court makes such an order, it may also make an order for costs of the proceedings.

Section 22 makes effective tools available to provide relief when a spouse is not forthcoming about income disclosure.

Failure to comply

22.(1) Where a spouse fails to comply with section 21, the other spouse may apply

(*a*) to have the application for a child support order set down for a hearing, or move for judgment; or

(*b*) for an order requiring the spouse who failed to comply to provide the court, as well as the other spouse or order assignee, as the case may be, with the required documents.

Costs of the proceedings

(2) Where a court makes an order under paragraph (1)(*a*) or (*b*), the court may award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.

APPLICATION

ISSUE

This section has generally been applied as intended.

CASE LAW

There is very little case law applying section 22. In the case of *Seidlikoski* v. *Hall*,[344] the court confirmed that under paragraph 22(1)(a), when a spouse fails to provide income information, the other spouse can apply to have the application set down for a hearing and may move for judgment.

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[344] ***Seidlikoski* v. *Hall* (14 June 2000), Regina 14,744, [2000] S.J. No. 378 (Q.B.).**

AMENDMENT

There has been no amendment to this section.

RECOMMENDATION

No amendments to this section are recommended.

SECTION 23: ADVERSE INFERENCE

BACKGROUND

If the court proceeds to a hearing under paragraph 22(1)(a), the court can make an unfavourable finding and impute income against the spouse who failed to disclose income.

Section 23 and paragraph 19(1)(f)[345] give the court another tool for providing relief when a spouse refuses to disclose income.

Adverse Inference

23. Where the court proceeds to a hearing on the basis of an application under paragraph 22(1)(*a*), the court may draw an adverse inference against the spouse who failed to comply and impute income to that spouse in such amount as it considers appropriate.

APPLICATION

ISSUE

This section has generally been applied as intended.

CASE LAW

There is very little case law applying section 23.

AMENDMENT

There has been no amendment to this section.

RECOMMENDATION

No amendment to this section is recommended.

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[345] **This paragraph reads "the spouse has failed to provide income information when under a legal obligation to do so".**

SECTION 24: FAILURE TO COMPLY WITH COURT ORDER

BACKGROUND

Section 24 sets out what a court can order in situations where a spouse fails to disclose information after having been ordered to do so under paragraph 22(1)(b). It empowers the court to impose further sanctions.

Failure to comply with court order

24. Where a spouse fails to comply with an order issued on the basis of an application under paragraph 22(1)(*b*), the court may

- (*a*) strike out any of the spouse's pleadings;
- (*b*) make a contempt order against the spouse;
- (*c*) proceed to a hearing, in the course of which it may draw an adverse inference against the spouse and impute income to that spouse in such amount as it considers appropriate; and
- (*d*) award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.

APPLICATION

ISSUE

This section has generally been applied as intended.

CASE LAW

There is very little case law applying section 24. In *Le Page* v. *Porter*,[346] the court stated that in a hearing under 24(c), the court can draw an adverse inference or impute income to the defaulting spouse.

AMENDMENT

There have been no amendments to this section.

RECOMMENDATION

No amendments to this section are recommended.

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[346] *Le Page* v. *Porter* (2000), 7 R.F.L. (5th) 335 (Ont. Sup. Ct. Just.).

SECTION 25: CONTINUING OBLIGATION TO PROVIDE INCOME INFORMATION

Continuing obligation to provide income information

25.(1) Every spouse against whom a child support order has been made must, on the written request of the other spouse or the order assignee, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, provide that other spouse or the order assignee with

- (*a*) the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents;
- (*b*) as applicable, any current information, in writing, about the status of any expenses included in the order pursuant to subsection 7(1); and
- (*c*) as applicable, any current information, in writing, about the circumstances relied on by the court in a determination of undue hardship.

Below minimum income

(2) Where a court has determined that the spouse against whom a child support order is sought does not have to pay child support because his or her income level is below the minimum amount required for application of the tables, that spouse must, on the written request of the other spouse, not more than once a year after the determination and as long as the child is a child within the meaning of these Guidelines, provide the other spouse with the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents.

BACKGROUND

Even after a child support order has been made, spouses must still provide relevant income information. This obligation cannot be limited in a court order or separation agreement.

In addition, spouses must provide current information on the status of special or extraordinary expenses as well as information on the circumstances that the court used to find undue hardship.

This section ensures that the parents are kept informed of any changes in income or circumstances so that they can keep their court orders current.

APPLICATION

ISSUE

This section has generally been applied as intended.

CASE LAW

There is very little case law applying this section. Courts have confirmed that the disclosure is required once yearly.[347] In the case of *Desjardins* v. *Desjardins*,[348] the court stated that, aside from undue hardship applications, the spouse's obligation to disclose income information did not extend to the new spouses of the litigants.

AMENDMENT

This section has not been amended.

RECOMMENDATION

This section should be amended to allow courts to order disclosure in cases involving adult children. See the clause-by-clause review of section 3 for further details.

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[347] *Ireland, supra* note 68.

[348] *Desjardins* v. *Desjardins* (1999), 49 R.F.L. (4th) 242 (B.C.S.C.).

25. ...

Obligation of receiving spouse

(3) Where the income information of the spouse in favour of whom a child support order is made is used to determine the amount of the order, the spouse must, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, on the written request of the other spouse, provide the other spouse with the documents and information referred to in subsection (1).

Information requests

(4) Where a spouse or an order assignee requests information from the other spouse under any of subsections (1) to (3) and the income information of the requesting spouse is used to determine the amount of the child support order, the requesting spouse or order assignee must include the documents and information referred to in subsection (1) with the request.

SOR/97-563, s. 3

Time limit

(5) A spouse who receives a request made under any of subsections (1) to (3) must provide the required documents within 30 days after the request's receipt if the spouse resides in Canada or the United States and within 60 days after the request's receipt if the spouse resides elsewhere.

Deemed receipt

(6) A request made under any of subsections (1) to (3) is deemed to have been received 10 days after it is sent.

Failure to comply

(7) A court may, on application by either spouse or an order assignee, where the other spouse has failed to comply with any of subsections (1) to (3)

(*a*) consider the other spouse to be in contempt of court and award costs in favour of the applicant up to an amount that fully compensates the applicant for all costs incurred in the proceedings; or

(*b*) make an order requiring the other spouse to provide the required documents to the court, as well as to the spouse or order assignee, as the case may be.

Unenforceable provision

(8) A provision in a judgment, order or agreement purporting to limit a spouse's obligation to provide documents under this section is unenforceable.

SCHEDULE I: FEDERAL CHILD SUPPORT TABLES

BACKGROUND

The Federal Child Support Tables set out the amount of monthly child support payments for each province and territory based on the annual income of the paying parent and on the number of children for whom a table amount is payable.

What percentage of gross and net income are paying parents paying out in child support?

Paying parents are paying from 1 percent to 36 percent of their gross income under the child support tables, depending on the province and the number of children.

The values vary from 1 percent to 48 percent for net income, which is gross income less federal, provincial, and territorial taxes, and less such statutory deductions as employment insurance and Canada Pension Plan/Quebec Pension Plan.

The highest percentages of both gross and net income are for paying parents with higher incomes and a greater number of children.

Examples

A paying parent with a gross income of $15,000 would pay, on average, a table amount of 9 percent of that income for one child and about 23 percent for six children. This would be about 11 percent of that person's net income for one child and 28 percent of net income for six children.

A paying parent with a gross income of $80,000 would pay, on average, 10 percent of that income for one child and about 30 percent for six children. The equivalent percentages of net income would be 15 percent for one child and 47 percent for six children.

For low-income paying parents, there is a threshold level of income (the "adult personal reserve") below which no amount of child support is payable. Child support amounts are specified up to an income level of $150,000 per year. At the $150,000 limit, the tables specify an additional percentage of income above $150,000, which may be added to the table amount for the initial $150,000. Section 4 of the Guidelines provides parents and the courts with two optional approaches for determining child support payments for paying parents with annual incomes above $150,000.[349]

The amounts in the tables are based on economic studies of average spending on children in families at different income levels in Canada. The formula that generates the tables takes into account the "adult personal reserve"; federal, provincial, and territorial income taxes; and the fact that child support payments are no longer taxable in the hands of the receiving parent and no longer deductible by the paying parent. The tables exclude certain refundable credits that do not appear on tax forms, such as the National Child Tax Benefit and the goods and services tax credit for children. Because of differences in provincial and territorial tax rates, each province and territory has a separate table. At lower income levels, the formula is modified to account for the combined impact of taxes and child support payments on the paying parent's limited disposable income.

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[349] **See the review of section 4.**

In most cases, the table amounts are minimum amounts. No reduction is permitted, other than in those situations listed in the *Divorce Act* or in sections 3(2) to 10 of the *Federal Child Support Guidelines*.

APPLICATION

ISSUE

UPDATING THE TABLES

Currently, the published tables are based on the 1996 and 1997 tax parameters and tax structures. Changes to tax systems or levels can either increase or decrease child support amounts from those in the tables. Every year since 1997, these changes have been monitored. The Department used an updated formula to recalculate table amounts and compare them with those in the published tables. In doing this, the Department has found that, although there have been some notable changes to taxation in some provinces, the impact on the table amounts is negligible at most levels of the income spectrum. There has been no compelling need to adjust the table amounts.

IMPACT OF CANADA PENSION PLAN BENEFITS

The courts have looked at the impact on the table amount of Canada Pension Plan (CPP) benefits paid to a child (called Disabled Contributor's Child Benefits, or DCCBs). According to Human Resources Development Canada, these payments are strictly intended for the child. A paying parent's own CPP disability benefits are not affected by the DCCBs paid to a child, so this doesn't affect his or her ability to pay child support. Furthermore, according to the Canada Customs and Revenue Agency, the child pays taxes on DCCBs received either by an adult child or by a parent on the child's behalf, as these DCCBs belong to the child.

In an intact family, a child benefits from all sources of income available to the family, including both of the parents' CPP benefits and the child's DCCBs. Children should continue to benefit from all of these sources of income even after their parents separate. Of course, the court can consider benefits paid to a child in cases where it has discretion to do so, such as when there are special expenses or the child is an adult.[350]

CASE LAW

A review of the case law reveals that Schedule I has generally been applied as intended.[351] Many cases have dealt with CPP benefits, including *Di Fabio* v. *Di Fabio*,[352] *Schroder* v. *Schroder*,[353] *Corkum* v. *Corkum*,[354] and *Griffiths* v. *Griffiths*.[355] In *Rousseau* v. *Rousseau*,[356] the court said that DCCBs are meant to compensate the child for the parent's decreased income-earning ability.

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[350] See the review of section 7 for more information.

[351] See, for example, *Hansvall*, *supra* note 237; *Stokes* v. *Stokes* (26 November 1999), Ontario 8771/99, [1999] O.J. No. 5192 (Sup. Ct. Just.); *Blain* v. *Blain* (1998), 39 R.F.L. (4th) 327 (Ont. Ct. (Gen. Div.)).

[352] *DiFabio*, *supra* note 147.

[353] *Schroder* v. *Schroder* (1998) 221 A.R. 395, 38 R.F.L. (4th) 395 (Q.B.).

[354] *Corkum* v. *Corkum* (1998), 166 N.S.R. (2d) 329, 36 R.F.L. (4th) 367 (S.C.).

[355] *Griffiths* v. *Griffiths* (1999), 242 A.R. 186, 45 R.F.L. (4th) 353 (Q.B.).

[356] *Rousseau* v. *Rousseau* (1999), 181 Sask. R. 144 (Q.B.).

AMENDMENT

The tables were amended in 1997 to correct a typographical error in the Yukon tables at the first two income levels. In 1999, Nunavut was added as paragraph (m) in Note 4 of Schedule I. The child support table for Nunavut, which copies the child support table for the Northwest Territories, was inserted in Schedule I.

RECOMMENDATION

The Federal Child Support Tables should be amended every five years or earlier. They should also be amended on an ad hoc basis with the agreement of the provinces and territories if there is a significant change in taxation or other parameters.

Because the formula is robust, few changes are likely to be required within any five-year period. It will therefore be less costly for the federal, provincial, and territorial governments to publish new tables every five years. Fewer amendments mean less confusion for courts, lawyers, and parents. All tables would be amended at the same time, reinforcing fairness and uniformity across the country. This built-in flexibility complements long-term stability by providing a hedge against major changes in future tax parameters.

SCHEDULE II: COMPARISON OF HOUSEHOLD STANDARDS OF LIVING TEST

BACKGROUND

GENERAL

Section 10 of the *Federal Child Support Guidelines* permits parents and courts to determine to an amount of child support that differs from the table values if either parent or a child of the marriage would otherwise suffer undue hardship.[357]

The parent claiming undue hardship must demonstrate not only that circumstances giving rise to undue hardship exist, but also that his or her household does not have a higher standard of living than that of the other parent. If so, the court may order a different amount of support, but it is not required to do so. The courts only compare household standards of living when proven circumstances are giving rise to undue hardship.

Subsection 10(4) of the Guidelines refers to the Comparison of Household Standards of Living Test found in Schedule II. Because use of the test is optional, courts and parents may employ other methods to determine the relative standards of living of each household.

By requiring a comparison of the standards of living of each household, the Guidelines ensure that child support is not reduced when the child is living in a home with an even lower standard of living. The test accounts for the overall standard of living by including not only the parents, but also all members of each household.

THE SIX-STEP PROCESS

The test uses a six-step calculation to objectively compare each household's overall standard of living.

STEP 1

Establish the annual income of each person in each household by applying the formula (A - B) where:

- A is the person's income determined under sections 15 to 20 of the Guidelines, and
- B is the federal and provincial tax payable on the person's taxable income.

The court can impute an appropriate amount when the information on which to base the income determination is not provided.

Step 1 calculates the annual income of each person in each household. A household is defined to include the spouse and any person living with the spouse who is a dependent or a provider. The definition therefore includes the spouse's common-law partner and the common-law partner's children who are living with the spouse. A child of the marriage in a shared custody arrangement is considered as part of the household of each parent.
Sections 15 to 20 of the Guidelines and Schedule III are used to determine income, just as they are used when determining income for child support. As when calculating income for child support, income may be imputed in appropriate circumstances under section 19 of the Guidelines. The annual income of each household member is then adjusted for federal and provincial income taxes payable. Taxable income is the same as "Taxable income" in the T1 General form issued by the Canada Customs and Revenue Agency.

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[357] **For a detailed review, see "Section 10: Undue Hardship."**

STEP 2

Step 2 adjusts the annual income of each household member according to the listed criteria. The adjustments provide a more accurate estimate of the available cash flow in each household.

Paragraph (a) lists three types of deductions from the annual income for each family member, while paragraph (b) lists two circumstances in which one adds to annual income. These deductions and additions recognize amounts that may or may not be available to households when calculating their standards of living.

THE THREE DEDUCTIONS

Under subparagraph (a)(i), any amount the court used to find undue hardship should be deducted from annual income. For example, if $5,000 in annual access expenses leads to a finding of undue hardship to the paying parent, then, the paying parent may deduct $5,000 from his or her annual income for the purpose of the test. See the detailed review of subsection 10(2) of the Guidelines for circumstances that produce undue hardship. The spouse claiming undue hardship deducts a specified amount from his or her annual income. There is an exception: one cannot claim a deduction if the court found undue hardship because the paying parent supported a member of his or her second family who is not disabled or seriously ill. This second family is already factored into the household size when low-income measures are applied, as discussed below.

Subparagraph (a)(ii) lets the paying parent deduct from his or her annual income the child support amount that would otherwise be payable for the benefit of the children of the marriage. So, if the paying parent would had been required to pay, for example, $10,000 per year in child support (before considering an undue hardship claim) was not made, then $10,000 is deducted from the paying parent's annual income for the purposes of the test. The table amount will be deducted unless determining the child support amount allows a departure from the table values, such as when the paying parent's income is over $150,000 (section 4) or when the parents share custody (section 9). Section 7 expenses are not deductible for either parent.

Subparagraph (a)(iii) lets either spouse deduct any amount of support that a household member is obliged to pay under a judgment, order, or written separation agreement. This subparagraph permits a deduction for spousal support. This deduction is available to any household member who has such a support obligation. If the amount was already deducted under subparagraph (a)(i) or (a)(ii), it will not be deducted again. There is no comparable clause requiring the deduction of spousal support received, because this amount is already factored into the way annual income is determined under Step 1.

THE TWO ADDITIONS

Subparagraph (b)(i) requires the receiving parent to include as income the child support amount that he or she would otherwise get if there had not been a claim for undue hardship. As in subparagraph (a)(i), the court may add the table amount. If that is not appropriate, the court may add another, more appropriate, amount.

Subparagraph (b)(ii) requires any household member to add to annual income any amount he or she gets for child support, whether under judgment, order, or written separation agreement.

STEP 3

In Step 3, the total household income for each household is determined by adding the adjusted annual income for everyone in each household. Step 3 ensures that all available sources of income are considered.

STEP 4

The applicable low-income measures amounts are determined for each household based on the following charts.

Low-Income Measures

Household size	Low-income measures amount
One person	
One adult	$10,382
Two persons	
Two adults	$14,535
One adult and one child	$14,535
Three persons	
Three adults	$18,688
Two adults and one child	$17,649
One adult and two children	$17,649
Four persons	
Four adults	$22,840
Three adults and one child	$21,802
Two adults and two children	$20,764
One adult and three children	$20,764
Five persons	
Five adults	$26,993
Four adults and one child	$25,955
Three adults and two children	$24,917
Two adults and three children	$23,879
One adult and four children	$23,879
Six persons	
Six adults	$31,145
Five adults and one child	$30,108
Four adults and two children	$29,070
Three adults and three children	$28,031
Two adults and four children	$26,993
One adult and five children	$26,993
Seven persons	
Seven adults	$34,261
Six adults and one child	$33,222
Five adults and two children	$32,184
Four adults and three children	$31,146
Three adults and four children	$30,108
Two adults and five children	$29,070
One adult and six children	$29,070

Household size	Low-income measures amount
Eight persons	
Eight adults	$38,413
Seven adults and one child	$37,375
Six adults and two children	$36,337
Five adults and three children	$35,299
Four adults and four children	$34,261
Three adults and five children	$33,222
Two adults and six children	$32,184
One adult and seven children	$32,184

A larger household might have a higher income than a smaller household would, but its needs are also greater. What income would the larger household need to have the same standard of living as the smaller household? The low-income measures set out to adjust the annual household incomes determined in Step 3 by taking into account family size and composition. This provides a means of comparing the relative standards of living between the two households.

The low-income measures presented in Step 4 of the test are those calculated by Statistics Canada's Household Surveys Division for 1994. They represent half the median after-tax family income adjusted for family size and composition and are not a measure of poverty. Relative to each other, the low-income measures are stable from year to year. Moreover, the low-income measures can compare household economic status across a wide range of incomes. The low-income measures objectively compare the relative standards of living of families of different sizes.

The reference value for a single-person household is $10,382. A couple or a single parent with one child is presumed to require 1.4 times the income of a single adult to be as well off, so the low-income measures value for a household of two is $14,535, or 1.4 times the reference value of $10,382. A couple with one child or a single parent with two children is presumed to require 1.7 times the income of a single adult to be as well off, so the low-income measures value for a household of three is $17,649, or 1.7 times the reference value of $10,382. The low-income measures provide a complete series of such related values for all household sizes and compositions.

STEP 5

Divide the household income amount (Step 3) by the low-income measures amount (Step 4) to get a household income ratio for each household.

STEP 6

The household income ratio represents the relative standard of living in each household. Compare the household income ratios. The family with the higher household income ratio has the higher standard of living. If the parent claiming undue hardship has a higher household standard of living, then there can be no finding of undue hardship.

APPLICATION

GENERAL

Use of the Comparison of the Household Standards of Living Test is optional,[358] but if a court doesn't use it, it must find some other way to compare the households' relative household standards of living.[359] As we've discussed, case law has also confirmed that the court may deny an application even when undue hardship exists and the applicant's household standard of living is below that of the other spouse.[360]

USE OF THE TEST

When the *Federal Child Support Guidelines* were introduced in May 1997, many observers criticized Schedule II as being too complex, too long, and too difficult to apply.[361] Since this test was not mandatory, courts did not take to it. It was used only in about one-quarter of the early cases involving successful undue hardship claims; more judges used alternative means.[362]

Here are some of the reasons that the test was not used in these early cases.

- The financial situation of the parties may have made the result of the test obvious and therefore unnecessary.
- Those without access to computer software, such as self-represented litigants, may have thought the calculation was too complex.
- It may have been too hard to get all of the required information about other household members, because nothing in the *Divorce Act* or in the *Federal Child Support Guidelines* requires the information to be disclosed.
- One has to know the amount of spousal support to finish the test, but one only determines that amount after calculating the child support amount, since subsection 15.3(1) of the *Divorce Act* directs courts to give priority to child support over spousal support.
- Some people feel that the test itself is artificial because it does not include the value of a family's assets or ongoing expenses and because the low-income measures may not reflect the actual spending patterns of the family.

Many observers called for the test to be either simplified or made mandatory so that it would be used more often and provide consistency and predictability of results.[363] Others argued that the test would be used more if court staff were better trained and if more people had the right computer software.[364]

[358] See, for example, *Shreeves* v. *Shreeves* (1997), 161 Sask. R. 212 (Q.B.); *Ness* v. *Ness* (1998), 125 Man. R. (2d) 173, [1998] 6 W.W.R. 404 (Q.B.).

[359] See, for example, *Loosdrecht* v. *Loosdrecht* (30 June 1998), New Westminster 98-13418, [1998] B.C.J. No. 1629 (B.C.S.C.).

[360] See, for example, *Hansvall, supra* note 237.

[361] Dalhousie University law professor D.A. Rollie Thompson, who has commented extensively on the test, has written: "Schedule II has been criticized as unduly complex, by myself and others: These elaborate calculations remind me of those old Rube Goldberg machines, many moving parts and much activity, for so little practical result." D.A. Rollie Thompson, "Spousal Support In, Around and After the Guidelines," Atlantic Courts Seminar, National Judicial Institute (Halifax, October 1997), p. 14.

[362] D.A. Rollie Thompson, *Of Camels and Rich Men: Undue Hardship, Part II* (October 1998), Ottawa, Department of Justice, p. 29. This case law review includes cases until early September 1998.

[363] D.A. Rollie Thompson, among others, argues that the test should be mandatory. In its June 1998 interim report on the Guidelines, the Standing Senate Committee on Social Affairs, Science and Technology recommended that the government try to simplify and clarify both section 10 and Schedule II.

[364] Queen's University law professor Nicholas Bala, in response to the Standing Senate Committee's recommendation that Schedule II be simplified, says that household standards of living must be compared, adjusting for household size and composition, and that this comparison is likely to be complicated. He argues that the provision must be narrow to ensure that children do not fall below the paying parent's standard of living. He recommends that the government provide access to software programs to help parents, either through court staff or through the Internet. Nicholas Bala, "Reforming the Child Support Guidelines" (February 1999) Ottawa, Department of Justice.

In spite of early resistance, courts have started using the test more often over time. By March 2000, the test was being used in more than half of the successful undue hardship claims based on second families.[365] Professor D.A. Rollie Thompson says, "In the past year and a half, the Department has seen a significant move [toward using the test], at least in the 'successful' second family cases."[366]

Regardless of the difficulties in applying the test, most observers agree that in appropriate cases, the test can accurately and usefully measure the relative standards of living of different households. While the test is somewhat complicated, it must be so if it is to account for both the composition of the household and the financial contribution of all its members.

OTHER METHODS OF COMPARING HOUSEHOLD STANDARDS OF LIVING

Courts have used other methods to compare household standards of living. In some cases where the households are the same size, judges have simply compared the household's gross income, rather than doing the net income analysis required by Schedule II.[367] In another line of cases, judges adopt an "absolute" rather than the relative test required by Schedule II, ruling that $93,000 a year[368] or $82,245[369] or $60,000[370] is more than enough to maintain a decent standard of living. Some Saskatchewan courts have added a variety of qualitative factors to the test, noting everything from the lower cost of rural living,[371] to the accumulation of RRSPs,[372] to doubts about including the new partner's income.[373] In many other cases, the lack of adequate evidence and Schedule II calculations have left judges to their own resources in applying section 10.

By making the test optional, the *Federal Child Support Guidelines* recognizes that the test is not always appropriate, such as in cases where families have large assets, debts, or unusual ongoing expenses. The disparate circumstances of Canadian families may make strict adherence to any single statutory test too restrictive.

FINANCIAL DISCLOSURE FROM OTHER HOUSEHOLD MEMBERS

To complete the test, one needs the annual income of each household member. While parents themselves are required to provide full and timely financial disclosure when relevant, nothing in the *Divorce Act* or the Guidelines compels other household members to do so, although Step 1 lets the court impute income in the amount it considers appropriate if it doesn't receive the information.[374]

The parent claiming undue hardship has the burden of proving it, so he or she must provide income information about all household members or risk having the court reject the claim.[375] But the issue of making the other parent's household members disclose income is controversial. Should disclosure be required in every case where undue hardship is claimed, or only when circumstances giving rise to undue hardship have been proven?

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[365] D.A. Rollie Thompson, *The Second Family Conundrum: Technical Solutions or Fundamental Choices* (March 2000) Ottawa, Department of Justice, p. 14. The case law review included cases from the inception of the Guidelines until March 2000.

[366] *Ibid.*, p. 14.

[367] See, for example, *Lauridsen* v. *Lauridsen* (2 July 1998), Kenora 98-15096, [1998] O.J. No. 2948 (Ont. Ct. Just. (Gen. Div.)); *Pilotte* v. *Pilotte* (5 February 1998), Kenora 97-075, [1998] O.J. No. 865 (Ont. Ct. Just. (Prov. Div.)).

[368] *Spanier*, *supra* note 202.

[369] *Taylor* v. *Taylor* (1 April 1998), Courtenay 98-12387, [1998] B.C.J. No. 937 (S.C.).

[370] *Hansvall*, *supra* note 237.

[371] *Hansvall*, *supra* note 237.

[372] *Woolhouse* v. *Jarosz* (1998), 162 Sask. R. 314 (Q.B.).

[373] *Nagy*, *supra* note 237.

[374] See, for example, *Feniak* v. *Gerhardt* (1998), 171 Sask. R. 262 (Q.B.).

[375] See, for example, *Laraque*, *supra* note 321.

Case law overwhelmingly confirms that full disclosure is required in every meritorious case of undue hardship, but courts have been somewhat divided as to when the disclosure should occur. Some require proof of a *prima facie* case of undue hardship before ordering disclosure,[376] while others require disclosure whenever a claim is made.[377]

Courts require early disclosure when they want to resolve claims as quickly as possible, whereas they require some proof of undue hardship in advance when they want to discourage abuses of the process and avoid unnecessary inquiries into the private matters of non-parties. A parent responding to a claim for undue hardship cannot avoid disclosure by conceding that his or her standard of living is higher than that the other parent's, because his or her income is also relevant to the determination of the amount of the support order when undue hardship is proven.[378]

AMENDMENTS

Several minor amendments were made to Schedule II in December 1997 to clarify and correct the test.

- The definition of *household* was amended to include the child of a common-law partner living with the spouse as a member of the household.
- Paragraphs (a) and (b) of Step 2 were corrected to state that the gross amounts of spousal and child support are to be used to calculate income because taxes are already taken into account in Step 1.
- Subparagraph (a)(i) was reworded so that no amount is to be deducted for a second family even if that second family is the cause of the finding of undue hardship, because the second family is taken into account in the low-income measures.
- Subparagraphs (a)(ii) and (b)(i) were amended to ensure that no amount for special expenses is deducted from the income of the paying parent because the contribution of the receiving parent to special expenses is not deducted from his or her income.
- Subparagraphs (a)(ii) and (a)(iii) were amended to ensure that the support amount is not deducted from the paying parent's income twice.

OPTIONS

SIMPLIFY THE TEST

Most observers agree that any useful model for comparing household standards of living must account for the contribution of each household member and must account for household size and composition.[379] Some have suggested that one way to maintain the integrity of the test and simplify it is to use the average tax rate instead of the actual taxes payable. The average tax rate would provide a fairly good estimation of the actual taxes payable and would eliminate the need for the detailed tax calculations required in Step 1. People who do not use computer software to complete the test would welcome this change.

While the use of an average tax rate seems promising, there are two problems with the proposal. First, there is no readily accessible current source of average tax rates. Second, because the results of the test using the average tax rate may vary slightly from results based on actual taxes, the situation will inevitably arise where using the actual tax rate will be more advantageous for a parent completing the test. The court would then be faced with the strong argument that, in the particular case, the actual tax rate should be used. Such arguments could create more confusion and complicate matters if parents complete the test using the most advantageous method.

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[376] See, for example, *Nishnik* v. *Smith* (1997), 162 Sask. R. 200 (Q.B.).

[377] See, for example, *Cuddie*, *supra* note 332.

[378] *Ibid.*

[379] See, for example, Bala, "Reforming the Child Support Guidelines," *supra* note 364.

MAKE USE OF THE TEST MANDATORY

A mandatory test would ensure that parents and courts compared standards of living in every case. Courts would still have the residual discretion to deny a claim even when the test shows undue hardship. This would reduce the use of "absolute" measures of standards of living and ensure a more rigorous evaluation of each claim.

However, as previously noted, the test is not appropriate in every case. For example, where one of the parents has significant assets or unusual expenses, the test is not as useful. Forcing parents and courts to complete the test when it is clearly inappropriate may unduly complicate matters.

REQUIRE FINANCIAL DISCLOSURE BY OTHER HOUSEHOLD MEMBERS

As noted above, courts disagree regarding when and if financial disclosure from other household members must take place. Nothing in the Guidelines compels such disclosure and this has led to uncertainty. The Guidelines could be amended to clearly state when and what disclosure is required, and the section could include specific remedies for non-compliance, including attendance at discoveries.

Many have argued that disclosure in every case may be an abuse of process, particularly if the claim for undue hardship is frivolous. Some say that requiring such disclosure could in fact increase tension and litigation, contrary to the objectives of the Guidelines. The courts have found that a duty to disclose does not breach the section 7 privacy rights enshrined in the *Charter of Rights and Freedoms*.[380] The courts currently have broad and effective powers to impute income[381] of non-complying household members or to simply dismiss undue hardship claims, and they use these powers when necessary.

INCREASING FAIRNESS OF THE TEST

Many observers have correctly noted that the current test does not account for statutory payroll deductions in the calculation of income. This is contradictory because Step 1 accounts for other cash flow sources. One proposal is to deduct Canada Pension Plan/Quebec Pension Plan and employment insurance payments from income when completing the test. Statutory payroll deductions are conditions of employment and the deductions are not funds that are available to the employee, so removing them from income would make the test fairer.

RECOMMENDATIONS

The federal Department of Justice recommends that the Comparison of Household Standards of Living Test in Schedule II be amended so that both parents could deduct source deductions for Canada Pension Plan/Quebec Pension Plan and employment insurance when calculating household income.

The recommendation will ensure that each household's income amount better reflects actual cash flow. This change will ensure that parents and judges have a better picture of the available income in each household and that decisions to increase or decrease the child support table amount are fair, just, and in the best interests of children.

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[380] See, for example, *Souliere v. Leclair*, [1998] O.J. No. 1393 (Gen. Div.).

[381] See Step 1.

SCHEDULE III: SECTIONS 1 TO 13

Schedule III of the *Federal Child Support Guidelines* sets out a list of adjustments to a spouse's annual income. These adjustments ensure that the child support amount is calculated based on actual available income.

SECTION 1: EMPLOYMENT EXPENSES

Employment expenses

1. Where the spouse is an employee, the spouse's applicable employment expenses described in the following provisions of the *Income Tax Act* are deducted:

(*a*) [Repealed] SOR/00-337, s. 8 (1);
(*b*) paragraph 8(1)(*d*) concerning expenses of teacher's exchange fund contribution;
(*c*) paragraph 8(1)(*e*) concerning expenses of railway employees;
(*d*) paragraph 8(1)(*f*) concerning sales expenses;
(*e*) paragraph 8(1)(*g*) concerning transport employee's expenses;
(*f*) paragraph 8(1)(*h*) concerning travel expenses;
(*f*.1) paragraph 8(1)(*h*.1) concerning motor vehicle travel expenses;
(*g*) paragraph 8(1)(*i*) concerning dues and other expenses of performing duties;
(*h*) paragraph 8(1)(*j*) concerning motor vehicle and aircraft costs;
(i) paragraph 8(1)(*l*.1) concerning Canada Pension Plan contributions and Employment Insurance Act premiums paid in respect of another employee who acts as an assistant or substitute for the spouse;
(*j*) paragraph 8(1)(*n*) concerning salary reimbursement;
(*k*) paragraph 8(1)(*o*) concerning forfeited amounts;
(*l*) paragraph 8(1)(*p*) concerning musical instrument costs; and
(*m*) paragraph 8(1)(*q*) concerning artists' employment expenses.

SOR/97-563, s. 12
SOR/2000-337, s. 8(1), (2)

BACKGROUND

In certain circumstances an employee may be required to incur non-reimbursable expenses due to the nature of his or her employment. The employee must incur these expenses.

Unlike the business expenses of a self-employed individual, such expenses are not set off against gross income, thereby reducing total income. They are deducted on a tax return after the "Total income" line, so they must be deducted from total income for Guidelines purposes.

Section 1 of Schedule III allows the deduction of certain employment expenses permitted by section 8 of the *Income Tax Act*. The most common expenditures deducted by virtue of section 8 are travel expenses, and professional, association, or union dues.

APPLICATION

ISSUE

Section 1 is generally being applied as intended.

CASE LAW

Initially, there was some confusion in the application of paragraph 1(i) regarding Canada Pension Plan (CPP)/Quebec Pension Plan (QPP) and employment insurance (EI) premiums. As confirmed in *Phillips* v. *Phillips*,[382] as well as by many other cases since, the deduction permitted by subsection 8(1)(l.1) of the *Income Tax Act* is restricted to CPP contributions and EI premiums paid for other employees who act as assistants or who substitute for the spouse. An amendment in December 1997 confirmed the correct application of this paragraph.

AMENDMENT

Section 1 has been amended twice.

On December 9, 1997, paragraph 1(i) was amended to reflect the proper deduction as described in subsection 8(1)(l.1) of the *Income Tax Act*. The *Income Tax Act* provides that the deduction is only for CPP and EI amounts paid for by a spouse, who is an employee, for another employee who is performing the spouse's duties of employment.[383]

On November 1, 2000, paragraph 1(a) was repealed. The deduction, which was for a clergyman's residence, differed from the other types of deductions in section 1 in that it allowed a member of the clergy to deduct an amount for a personal residence. Although this is permitted under the *Income Tax Act*, it was not appropriate for determining income under the Guidelines. The other deductions in section 1 are not related to such personal expenses.[384]

A new paragraph (f.1) was added[385] to include a deduction for an employee's motor vehicle travel expenses in the following situations:

- the employee is ordinarily required to work away from the employer's place of business or in different places,
- the employee is required to pay his or her own travelling expenses, and
- the employee does not get a tax-exempt allowance for travelling expenses.

RECOMMENDATION

No amendments to section 1 are recommended.

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[382] *Phillips* v. *Phillips* (1997), 42 B.C.L.R. (3d) 218, 32 R.F.L. (4th) 218 (S.C.).

[383] *Guidelines*, *supra* note 47, SOR/97-563, s. 12.

[384] *Guidelines*, *supra* note 47, SOR/2000-337, s. 8(1).

[385] *Guidelines*, *supra* note 47, SOR/2000-337, s. 8(2).

SECTION 2: CHILD SUPPORT

BACKGROUND

In determining a paying parent's income for Guidelines purposes, one should deduct any child support that is received and included in total income. These are funds that are not available to the paying parent for child support payments.

Child support

2. Deduct any child support received that is included to determine total income in the T1 General form issued by the Canada Customs and Revenue Agency.

SOR/97-563, s. 13
SOR/2000-337, s. 9

The amount of child and spousal support (if any) received by the paying parent during the year is included on line 128 of the federal income tax return. Only the child support amount should be deducted under this section. Whether the spousal support amount is deducted depends on the rules outlined in subsection 3(1).

APPLICATION

ISSUE

There is no issue with regard to this section.

CASE LAW

In the case of *Metzner* v. *Metzner*,[386] the receiving spouse's income comprised solely spousal and child support. The court found that, for the purposes of calculating the child support table amount, her income was nil.

AMENDMENT

This section has been amended twice.

On December 9, 1997, the word *received* was added after *child support* to clarify that only the recipient of any child support can deduct this amount. The provision ensures that a paying parent's ability to pay is not based on child support payments received for the benefit of another child.[387]

On November 1, 2000, the section was amended to reflect Revenue Canada's change of name to the Canada Customs and Revenue Agency.[388]

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[386] ***Metzner, supra*** **note 52.**
[387] ***Guidelines, supra*** **note 47, s. 13.**
[388] ***Guidelines, supra*** **note 47, s. 9.**

RECOMMENDATION

No amendments to section 2 are recommended.

SECTION 3: SPOUSAL SUPPORT

BACKGROUND

Under subsection 3(1), the spousal support amount (in total income) received from a former spouse should be deducted when calculating a support payer's income to find the basic amount of child support from the child support tables.

Under subsection 3(2), spousal support paid must be deducted from total income when determining an amount under section 7 (special expenses) of the Guidelines. Conversely, spousal support received would remain in income for section 7 purposes.

Spousal support

3.(1) To calculate income for the purpose of determining an amount under an applicable table, deduct the spousal support received from the other spouse.

Special or extraordinary expenses

(2) To calculate income for the purpose of determining an amount under section 7 of these Guidelines, deduct the spousal support paid to the other spouse.

Child support has priority over spousal support under section 15.3 of the *Divorce Act*. So in most cases, the child support amount will have been determined before the spousal support amount is. Therefore, subsection 3(1) should be used to make sure that one includes all the income available for child support purposes in the Guidelines when applying the tables. If there are special and extraordinary expenses, subsection 3(2) says that the paying spouse should deduct spousal support paid, which is then included in the receiving spouse's income. This allows the courts and parents to determine section 7 expenses and how they will be shared, given any spousal support paid and received.

APPLICATION

ISSUE

This section has caused some confusion. Although the *Divorce Act* states that child support has priority over spousal support, if there are section 7 expenses, these may be determined and apportioned according to income—an income that must take into account spousal support paid or received between the two spouses. Despite this apparent contradiction, the case law has generally found that the court should decide whether there are any special expenses before determining the spousal support. After the court has decided on spousal support, then the special expenses can be apportioned between the parties, keeping in mind that any spousal support paid to the other spouse should be deducted from income.

CASE LAW

In *Schick* v. *Schick*[389] and *Mabbett* v. *Mabbett*,[390] the court confirmed that spousal support received by a spouse from the other spouse should be deducted from income when determining the table amount.

In the case of *Metzner*,[391] the receiving spouse's income comprised solely spousal and child support. The court found that, for the purposes of calculating the child support table amount, her income was nil.

The cases of *L'Heureux* v. *L'Heureux*[392] and *Blair*[393] confirmed that the issue of spousal support must be determined before apportioning section 7 expenses.

And in several other cases,[394] the court stated that spousal support paid to another spouse must be deducted from total income when determining income for the purposes of sharing special expenses between the parties.

AMENDMENT

This section has not been amended.

RECOMMENDATION

No amendments to section 3 are recommended.

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[389] ***Schick, supra*** **note 61.**
[390] ***Mabbett*** **v.** ***Mabbett*** **(1999), 48 R.F.L. (4th) 157 (N.S. S.C.).**
[391] ***Metzner, supra*** **note 52.**
[392] ***L'Heureux*** **v.** ***L'Heureux*** **(12 November 1999), Regina, [1999] S.J. No. 748 (Q.B.).**
[393] ***Blair, supra*** **note 136.**
[394] ***Garrison, supra*** **note 80;** ***Krislock, supra*** **note 136.**

SECTION 4: SOCIAL ASSISTANCE

BACKGROUND

This section was designed to ensure that only the social assistance income directly attributable to the spouse be included as Guidelines income. If a spouse gets social assistance on behalf of other members of the household, this money should not be included in the spouse's income.

Social assistance

4. Deduct any amount of social assistance income that is not attributable to the spouse.

SOR/2000-337, s. 10

APPLICATION

ISSUE

There is no issue raised under this section.

CASE LAW

The case law clearly sets out that social assistance income must be included when calculating income under the Guidelines,[395] but only the social assistance attributable to that spouse.[396]

AMENDMENT

This section was amended effective November 1, 2000,[397] to clarify that only the social assistance attributable to the parent is to be included in the parent's income. The amendment adopted wording already used in other sections in Schedule III to provide consistency.

RECOMMENDATION

No amendments to section 4 are recommended.

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[395] See *Chambers*, *supra* note 64; *Loughran* v. *Loughran* (2000), 182 N.S.R. (2d) 143 (S.C.).

[396] *Chambers*, *ibid.*

[397] *Guidelines*, *supra* note 47, SOR/2000-337, s. 10.

SECTION 5: DIVIDENDS FROM TAXABLE CANADIAN CORPORATIONS

BACKGROUND

Dividends from taxable Canadian corporations are reported and taxed differently than regular income. On the tax return, a spouse reports 125 percent of the actual dividends received. Therefore, it is appropriate, when determining Guidelines income, to include a spouse's actual dividends, not the taxable dividends reported on the tax return.

Dividends from taxable Canadian corporations

5. Replace the taxable amount of dividends from taxable Canadian corporations received by the spouse by the actual amount of those dividends received by the spouse.

Application

ISSUE

The application of this adjustment to income is straightforward. There is no issue.

CASE LAW

The courts have applied this section as intended.[398]

AMENDMENT

This section has not been amended.

RECOMMENDATION

No amendments to section 5 are recommended.

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[398] See *Kelly*, *supra* note 308; *Wilson*, *supra* note 299; *Addison* v. *Dornian* (1998), 124 Man. R. (2d) 268, 36 R.F.L. (4th) 335 (Q.B.).

SECTION 6: CAPITAL GAINS AND CAPITAL LOSSES

BACKGROUND

Capital gains are reported and taxed differently than regular income. A spouse reports 75 percent of the actual capital gains on his or her federal income tax return, even though the spouse benefits from the entire capital gain. Therefore, subject to subsection 17(2) of the Guidelines,[399] it is appropriate, when determining Guidelines income, to include the actual capital gains and not the gains reported on the tax return.

Capital gains and capital losses

6. Replace the taxable capital gains realized in a year by the spouse by the actual amount of capital gains realized by the spouse in excess of the spouse's actual capital losses in that year.

For income tax purposes, capital losses are set off against capital gains, so only the net taxable capital gain is included in total income. By substituting actual net capital gains for taxable capital gains, no further adjustment is required for capital losses incurred in the year. If capital losses exceed capital gains, one can carry the excess loss forward. One can also carry back these capital losses to any of the prior three years, setting these losses off against any capital gains in those years. The Guidelines only let one adjust income by the capital losses in that year.

APPLICATION

ISSUE

This section has been applied as intended.

CASE LAW

There is very little case law applying this section. In *Mertler*,[400] the court confirmed that under the Guidelines, all the net capital gain should be included in a spouse's income.

AMENDMENT

There has been no amendment to this section.

RECOMMENDATION

No amendments to section 6 are recommended.

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[399] **See the review of section 17 for more information.**

[400] ***Mertler, supra*** **note 208.**

SECTION 7: BUSINESS INVESTMENT LOSSES

BACKGROUND

Seventy-five percent of actual business investment losses are reported on the federal income tax return. These are called an allowable business investment loss on line 217 of the T1 General Form. The *Income Tax Act* gives special treatment to capital losses that are business investment losses, allowing taxpayers to deduct them against any type of income, not just against capital gains.

Business investment losses

7. Deduct the actual amount of business investment losses suffered by the spouse during the year.

Subject to subsection 17(2) of the Guidelines,[401] it is appropriate, when determining income for child support purposes, to deduct the *actual* investment loss and not the *allowable* business investment loss. A spouse's business investment losses that are deducted below the "Total income" line on the tax return should be deducted from total income in calculating Guidelines income.

APPLICATION

ISSUE

This section has generally been applied as intended.

CASE LAW

There is very little case law applying this section. In various cases, the courts outline when it is appropriate to deduct business investment losses per the Guidelines.[402]

AMENDMENT

There has been no amendment to this section.

RECOMMENDATION

No amendments to section 7 are recommended.

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[401] See the review of section 17 for more information.

[402] See *Omah-Maharajh, supra* note 304; *Cooke* v. *Colomy* (1998), 38 R.F.L. (4th) 342 (Man. Q.B.); *Dancak* v. *Dancak* (1998), 38 R.F.L. (4th) 227 (B.C.S.C.).

SECTION 8: CARRYING CHARGES

BACKGROUND

Carrying charges include interest, investment counsel fees, and other expenses incurred to generate income. For example, a spouse may borrow money to invest in stocks. The income earned from the stocks is included as investment income in total income. However, carrying charges and interest expenses are not deducted before determining total income. Therefore, when determining Guidelines income, section 8 lets spouses deduct from total income any carrying charges and interest expenses incurred to generate this investment income.

Carrying charges

8. Deduct the spouse's carrying charges and interest expenses that are paid by the spouse and that would be deductible under the *Income Tax Act*.

APPLICATION

ISSUE

This section has been applied as intended.

CASE LAW

Only interest and carrying charges can be deducted from income, not payments on principal.[403] In *Lamparski* v. *Lamparski,*[404] the spouse was allowed to deduct interest expenses incurred in running a daycare business.

AMENDMENT

There has been no amendment to this section.

RECOMMENDATION

No amendments to section 8 are recommended.

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[403] **See *Cornelius* v. *Andres* (1999), 134 Man. R. (2d) 140, 170 D.L.R. (4th) 254, 45 R.F.L. (4th) 200 (C.A.); *Tidball* v. *Tidball* (1999), 45 R.F.L. (4th) 437 (Ont. Ct. (Gen. Div.)).**

[404] ***Lamparski* v. *Lamparski* (1997), 35 R.F.L. (4th) 52 (B.C.S.C.).**

SECTION 9: NET SELF-EMPLOYMENT INCOME

BACKGROUND

This section prevents business owners from diverting income to other family members as a way of artificially reducing their Guidelines income. The owner of a business must show that, to earn income, he or she had to pay parties not at arm's length and that these payments were reasonable in the circumstances.

> **Net self-employment income**
>
> **9.** Where the spouse's net self-employment income is determined by deducting an amount for salaries, benefits, wages or management fees, or other payments, paid to or on behalf of persons with whom the spouse does not deal at arm's length, include that amount, unless the spouse establishes that the payments were necessary to earn the self-employment income and were reasonable in the circumstances.

APPLICATION

ISSUE

This section has been applied as intended.

CASE LAW

There is very little case law on this section. Cases decided under subsection 18(2) of the Guidelines may be applicable. In *Omah-Maharajh*,[405] the husband paid his current wife a salary to run his medical practice. The court found that the amount paid was both necessary and reasonable. Therefore, no additional income was imputed to the husband. Section 9 was applied similarly in *Andersen* v. *Andersen*.[406]

In *Wilcox*,[407] the Nova Scotia Court of Appeal stated that where the father did not establish that the income splitting with his present wife was necessary to earn his self-employment income and was reasonable in the circumstances, his income should be recalculated.

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[405] ***Omah-Maharajh, supra*** **note 304.**

[406] ***Andersen*** **v.** ***Andersen*** **(1997), 32 R.F.L. (4th) 177 (B.C.S.C.).**

[407] ***Wilcox, supra*** **note 334.**

AMENDMENT

There has been no amendment to this section.

RECOMMENDATION

No amendments to section 9 are recommended.

SECTION 10: ADDITIONAL AMOUNT

BACKGROUND

If reported self-employment income for a given reporting year includes income earned in previous years, a spouse must deduct this additional income, net of reserves, from total income.

People who became self-employed before 1995 may have a fiscal year-end other than December 31. For tax purposes, this option was eliminated for fiscal periods starting after 1994.

> **Additional amount**
>
> **10.** Where the spouse reports income from self-employment that, in accordance with sections 34.1 and 34.2 of the *Income Tax Act*, includes an additional amount earned in a prior period, deduct the amount earned in the prior period, net of reserves.
>
> *SOR/2000-337, s. 11*

Transitional income tax rules are in effect until 2004 that require the self-employed to calculate their income from the end of their 1995 fiscal year to December 31, 1995. This "sub period" income is included in income at the minimum rate of 5 percent in 1995, 10 percent in each of 1996 to 2003, and 15 percent in 2004. Therefore from 1996 to 2004, income reported on the tax return may be increased to include income that was actually earned prior to 1996 (the "stub period" income). Therefore, total business income may not truly reflect income earned in the year.

Section 10 deducts this stub period income to reflect only the actual business income earned in the year. Section 10 refers to this stub period income as the amount earned in the prior period, net of reserves.

APPLICATION

ISSUE

This section has been applied as intended. One issue has arisen in the case law. Although the stub period income may be deducted from income, taxes are paid on all income, including the stub period income. As such, the support-paying parent pays more income tax and therefore has less income from which to pay the child support amount.

CASE LAW

The case law states that there is no reduction to account for the tax paid on the additional income.[408] In *Merritt* v. *Merritt*,[409] the court stated that the Guidelines did permit the court to adjust the net income of the father to deduct the additional tax burden. However, if the father had claimed the residual income tax liability as a liability on his financial statement and used this to calculate equalization, then it would be double recovery if the father claimed this liability yet again to reduce his Guidelines income.

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[408] **See, for example, *Lepage* v. *Lepage* (1999), 179 Sask. R. 34 (Q.B.) [hereinafter *Lepage*].**

[409] ***Merritt* v. *Merritt* (11 May 1999), London F689/97, [1999] O. J. No. 1732 (Ont. Sup. Ct. Just.).**

AMENDMENT

This section was amended effective November 1, 2000.[410] As the fiscal year-end of a parent's business may not fall on December 31, reference to that date was removed. In addition, the section was clarified by referring to the relevant sections of the *Income Tax Act*.

The French version of section 10 was amended, replacing the word *réserve* with the word *provision*, which is the word that appears in the *Income Tax Act*.

RECOMMENDATION

It is recommended that section 10 not be amended at this time. This provision is transitional and will no longer be required after 2004.

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[410] ***Guidelines, supra*** **note 47, s. 11.**

SECTION 11: CAPITAL COST ALLOWANCE FOR PROPERTY

BACKGROUND

If a spouse deducts a capital cost allowance (CCA) for real property, he or she must add it back to total income.

On a T1 General Form, a spouse reports rental income net of expenses. For tax purposes, he or she can deduct CCA from net rental income because this non-cash expenditure can problably be recovered when he or she eventually sells the property. In other words, the property may not be sold at a loss at some time in the future. If the CCA were not added back to total income for Guidelines purposes, the spouse would benefit by reducing income because of expenses other than ongoing operating expenses.

Capital cost allowance for property

11. Include the spouse's deduction for an allowable capital cost allowance with respect to real property.

Only CCA taken on real property is added back. CCA claimed on equipment or on other business or rental assets is not added back because the value of these assets does depreciate and they will have to be replaced from time to time.

APPLICATION

ISSUE

Courts have been using discretion when applying this section. In some cases, mostly those dealing with farming income, the courts are also including the payor's deduction for allowable CCA for equipment or other business or rental assets. In these cases, they are finding that these deductions are not reasonable under the circumstances, per section 19 of the Guidelines. As noted earlier, an expense permitted per the *Income Tax Act* is not necessarily reasonable in determining Guidelines income.

CASE LAW

There have been several conflicting decisions under section 11 of Schedule III, mostly involving farming cases where CCA is claimed on farm machinery and equipment. In *Rudachyk* v. *Rudachyk*,[411] the father deducted CCA on equipment. The court decided that unless it believed CCA was unreasonably deducted, only CCA related to real property depreciation could be added back to income. A useful challenge to any CCA item would involve finding out when (or if) equipment will be replaced, how much doing so would cost, and perhaps whether one needs to replace it to produce income.

In *Wilson*,[412] the court stated that despite the possible deduction under section 11 of Schedule III, paragraph 19(1)(g) specifically says that expenses deducted for income tax purposes can be added back into income when "[t]he spouse unreasonably deducts expenses from income."[413] The court also held that under 19(2), the reasonableness of an expense deduction was not solely governed by whether the deduction was permitted under the *Income Tax Act*.

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[411] ***Rudachyk, supra*** **note 314.**

[412] ***Wilson, supra*** **note 299.**

[413] ***Ibid.*** **at para. 33.**

Most cases have asked whether a full deduction allowed under the *Income Tax Act* fairly recognizes the actual income available to the spouse from that income source. As with other income tax deductions, the courts are using their discretion when determining Guidelines income.

AMENDMENT

There has been no amendment to this section.

RECOMMENDATION

No amendment to section 11 is recommended. Although this section was inconsistently applied at first, that is changing as jurisprudence sets new parameters for reviewing CCA for both personal and real property.

SECTION 12: PARTNERSHIP OR SOLE PROPRIETORSHIP INCOME

BACKGROUND

On a personal income tax return, one includes one's share of income earned from a partnership, even if one didn't (or couldn't) withdraw it from the partnership. For example, because of cash flow problems, the partners may withhold income to cover operating costs, or they may withhold their income to finance new capital spending they need.

These funds would not be available to a spouse for Guidelines purposes. Therefore, one can deduct from total income any partnership income that the partnership leaves in the business.

Partnership or sole proprietorship income

12. Where the spouse earns income through a partnership or sole proprietorship, deduct any amount included in income that is properly required by the partnership or sole proprietorship for purposes of capitalization.

SOR/97-563, s. 14

APPLICATION

ISSUE

This section has been applied as intended.

CASE LAW

There is very little case law applying this section. In the case of *de Goede* v. *de Goede*,[414] the court considered the amounts the paying parent paid to reduce the mortgage on rental properties held through a partnership. The court decided that the paying parent could deduct this money from his total income because his partnership needed the money for capitalization.

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[414] ***de Goede, supra*** **note 35.**

AMENDMENT

This section was amended effective December 9, 1997.[415] The words *or a sole proprietorship* were added after *partnership*, since sometimes a sole proprietor needs to deduct capitalization costs.

RECOMMENDATION

No amendments to section 12 are recommended.

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[415] ***Guidelines, supra*** **note 47, SOR/97-563, s. 14.**

SECTION 13: EMPLOYEE STOCK OPTIONS WITH A CANADIAN-CONTROLLED PRIVATE CORPORATION

BACKGROUND

Section 13 sets out how to adjust income for Guidelines purposes when a parent exercises options to purchase shares.

When this section was first drafted, tax law treated employee stock options of Canadian-controlled private corporations (CCPCs) differently from non-CCPC corporate stock options. For a non-CCPC stock option, the income benefit[416] was included in income for tax purposes when one exercised an option to buy shares, rather than when one sold them, as was the case with CCPC stock options.

Section 13 ensured that one included the income benefit of CCPC stock options as income in the year one exercised the option. Under section 13, CCPC and non-CCPC options were treated the same way for Guidelines purposes. One could deduct under subsection 13(2) in the year one sold the options, so that there would be no double counting.

The Government of Canada's February 2000 budget allowed tax law to treat the gains on certain employee stock options in public company shares just as CCPCs are treated. In other words, these gains would now be taxed when sold, not when bought. As such, section 13 was expanded to include these options.[417]

Another minor amendment was made to subsection 13(2) in 2000. The word *a* was substituted for the word *the* to make the subsection consistent with the more correct French wording.[418]

Employee stock options

13.(1) Where the spouse has received, as an employee benefit, options to purchase shares of a Canadian-controlled private corporation, or a publicly traded corporation that is subject to the same tax treatment with reference to stock options as a Canadian-controlled private corporation, and has exercised those options during the year, add the difference between the value of the shares at the time the options are exercised and the amount paid by the spouse for the shares, and any amount paid by the spouse to acquire the options to purchase the shares, to the income for the year in which the options are exercised.

SOR/2001-292, s. 1

Disposal of shares

(2) If the spouse has disposed of the shares during a year, deduct from the income for that year the difference determined under subsection (1).

SOR/2000-337, s. 12

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[416] The income benefit is the fair market value of the shares at the time the option is exercised net of the cost of the shares (option price) and any amount paid to acquire the options. This benefit may be reduced by 25 percent when the option price was not less than the fair market value of the shares when the option was granted.

[417] *Guidelines, supra* note 47, SOR/2001-292, s. 1.

[418] *Guidelines, supra* note 47, SOR/2000-337, s. 12.

In most cases, employees exercise options and sell the shares simultaneously. This way, they can use the money from the sale to finance the purchase price and pay the personal tax. Their profit is the excess of the fair market value of the shares (sale price) over the cost of the shares (option price), and this profit is taxed in the year in which the shares are sold. When options are exercised and sold the same year, the benefit will be included in income in the same year the option is exercised.

APPLICATION

ISSUE

This section has been applied as intended.

CASE LAW

In *MacDonald* v. *MacDonald*,[419] the Alberta Court of Appeal stated that when the father left his job in 1996, he had to include in his 1996 income his entire net capital gain for disposing of stock options. The Court confirmed that stock options, when exercised, are an income source and should be included in income.

A parent bears the burden of proof when trying to exclude stock options from income on the grounds that they are non-recurring or capital in nature.[420]

RECOMMENDATION

No amendments to this section are recommended.

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[419] ***MacDonald* v. *MacDonald* (1997), 209 A.R. 178, 57 Alta. L.R. (3d) 195 (C.A.), leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 49.**

[420] ***Walker* v. *Walker* (1999), 1 R.F.L. (5th) 180 (Alta. Q.B.).**

REVIEW OF SECTIONS OF THE *DIVORCE ACT* THAT RELATE TO CHILD SUPPORT

SECTION 2: DEFINITIONS

BACKGROUND

Section 2 is concerned generally with the proper interpretation of the *Divorce Act*. Subsection 2(1) helps parents and courts by defining various terms and expressions found throughout the Act. Subsection 2(1) defines *child of the marriage*, which is then interpreted in subsection 2(2). A review of both is found below.

Subsections 2(5) and 2(6) are particularly important as they let the Governor in Council designate a province when defining *applicable guidelines*, as found in subsection 2(1), if the province addresses the particular matters set out in section 26.1. The province must have comprehensive guidelines for determining child support.

Definitions

2.(1) In this Act,

"age of majority" *«majeur»*

"age of majority", in respect of a child, means the age of majority as determined by the laws of the province where the child ordinarily resides, or, if the child ordinarily resides outside of Canada, eighteen years of age;

"applicable guidelines" *«lignes directrices applicables»*

"applicable guidelines" means

(a) where both spouses or former spouses are ordinarily resident in the same province at the time an application for a child support order or a variation order in respect of a child support order is made, or the amount of a child support order is to be recalculated pursuant to section 25.1, and that province has been designated by an order made under subsection (5), the laws of the province specified in the order, and

(b) in any other case, the Federal Child Support Guidelines;

"child support order" «ordonnance alimentaire au profit d'un enfant»

"child support order" means an order made under section 15.1(1)

"Federal Child Support Guidelines" «*lignes directrices fédérales sur les pensions alimentaires pour enfants*»
"Federal Child Support Guidelines" means the guidelines made under section 26.1

"provincial child support service" «*service provincial des aliments pour enfants*»

"provincial child support service" means any service, agency or body designated in an agreement with a province under subsection 25.1(1)

Provincial child support guidelines

(5) The Governor in Council may, by order, designate a province for the purposes of the definition "applicable guidelines" in subsection (1) if the laws of the province establish comprehensive guidelines for the determination of child support that deal with the matters referred to in section 26.1. The order shall specify the laws of the province that constitute the guidelines of the province.

Amendments included

(6) The guidelines of a province referred to in subsection (5) include any amendments made to them from time to time.

R.S. 1985, c. 3 (2nd Supp.), s. 2, c. 27 (2nd Supp.), s. 10; 1990, c. 18, s. 1; 1992, c. 51, s. 46; 1997, c. 1, s. 1; 1998, c. 30, ss. 13(F), 15(E); 1999, c. 3, s. 61.

APPLICATION

ISSUE

Case law has revealed a difference in the English and French definitions of *applicable guidelines* in section 2. The English version can be interpreted two different ways. The other definitions and subsections have generally been applied as intended.

CASE LAW

In *A.D.* v. *T.D.*,[421] the judge had to decide whether to apply federal or provincial guidelines to determine child support. When the original motion to vary the support order was filed, both parties lived in Quebec, but by the time of the trial, the father had moved to Ontario.

The judge, who was deciding whether to vary a child support order, noted an apparent difficulty with the definition of *applicable guidelines*, as well as the two possible English interpretations: *at the time an application is made* or *at the time an order is made*.

The court concluded that the second interpretation was inconsistent with the way orders were treated in originating applications. In these cases, the applicable guidelines are those in force in the province where the parties live at the time of the filing of the application. This is the case even if the debtor has, by the time of the hearing, moved out of that province. To allow a different rule to apply for variation orders would have the effect of treating initial orders and variation orders differently.

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[421] ***A.D.* v. *T.D.*, *Droit de la famille-2950*, [1998] R.J.Q. 1239 (Que. Sup. Ct. (Fam. Div.)).**

Furthermore, as pointed out in the case, the French version of the definition (*lignes directrices applicables*) cannot be read in two different ways and refers to *the date of the application* (*la date de présentation*) for both a motion for an initial order and a motion to vary.

The judge concluded that, based on paragraph 9(2)(b) of the *Official Languages Act*,[422] the first of the two possible interpretations of the English version must be adopted. He further held that *date de présentation* refers to the filing of a motion with the court and not to its presentation before a judge. It was further held that an applicant needs to know which rules he or she will be governed by from the moment an application for a variation is made, as this mandates the forms to be used and the calculations to be made.

Accordingly, the judge concluded that because both parties were *ordinarily resident* in Quebec when the original application for a variation order was filed, the provincial guidelines were the applicable guidelines in this case, despite the fact that the father was now in Ontario.

The other facets of this definition have been applied as intended. For example, in *M.(O.)* v. *K.(A.)*,[423] the court ruled that the federal guidelines for Quebec should apply as, contrary to paragraph (a), one of the spouses did not reside in Quebec.

RECOMMENDATION

It is recommended that the definition of applicable guidelines be amended to make it consistent with the French version. This amendment will confirm that, in cases to vary child support orders, courts should apply the guidelines applicable at the time the application is filed and not when the order is made.

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[422] **R.S.C. 1985, c. O-3.**

[423] ***O.M., supra*** **note 104.**

SUBSECTION 2(1) OF THE *DIVORCE ACT*: DEFINITIONS—CHILD OF THE MARRIAGE

BACKGROUND

Courts use the definition of *child of the marriage* to determine who qualifies for child support. For over 50 years, divorce laws in Canada have allowed child support for older children in appropriate circumstances.[424] Parliament codified the rules for determining support for older children when it introduced the *Divorce Act* in 1968. Since that time, older children have been eligible for support if they are unable to provide for themselves because of "illness, disability, or other cause." Over the years, the courts have ruled that the term *other cause* may include secondary or post-secondary studies.[425]

Definitions

2.(1) In this Act,

"child of the marriage"

«enfant à charge»

"child of the marriage" means a child of two spouses or former spouses who, at the material time,

(*a*) is under the age of majority and who has not withdrawn from their charge, or

(*b*) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

Before the 1997 changes to the *Divorce Act*, judges were allowed to decide whether child support payments should be made for children 16 years or older, although support was seldom terminated for dependent children when they reached that age. The new child support rules increased the threshold age from 16 to the age of majority in the province or territory where the children live and to 18 for children living out of the country. The age of majority is 18 in six provinces and is 19 in the four other provinces and the territories.

The age of majority is **18** in six provinces:

Ontario
Manitoba
Prince Edward Island
Alberta
Quebec
Saskatchewan

The age of majority is **19** in four provinces and three territories:

British Columbia
Newfoundland
Northwest Territories
Nunavut
New Brunswick
Nova Scotia
Yukon

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[424] See, for example, *Ferguson* v. *Ferguson*, [1949] 2 W.W.R. 879 (Alta. C.A.), where the court unanimously held that subsection 67(2) of the *Domestic Relations Act*, R.S.A., 1942, ch. 300, like section 35 of *The Divorce and Matrimonial Causes Act*, 1857, ch. 85, provides jurisdiction in divorce proceedings to order support for children until age 21. See also *Faustman* v. *Faustman*, [1952] 7 W.W.R. 373 (N.S. Q.B.) and *Firman* v. *Firman*, [1951] O.W.N. 66 (Ont. H.C.J.), where the courts held that in divorce actions children over 16 may receive support in the appropriate circumstances.

The phrase *who has not withdrawn from their charge* was also added in paragraph (a), so that support payments are not made for independent children under the age of majority.

Most of the provinces and all of the territories have laws that allow support for children the age of majority or over if the separating parents were not married, or if they were married but are not asking for a divorce.[426] Incorporating the provincial age of majority reflects established case law and makes orders under the *Divorce Act* more consistent with orders made under provincial and territorial statutes.

For more than 30 years, courts have ordered support for older children in school. In many cases, child support continued until the children completed a post-secondary degree, and sometimes later. Bill C-41 did not change the rules used to determine whether support should be paid for children at the age of majority or over. Judges continue to decide these cases on an individual basis.

The changes to the *Divorce Act* initially proposed to change the definition of *child of the marriage* to include children at the age of majority or over who are *in pursuit of reasonable education*. This amendment would have codified existing case law. It also reflected the view, generally expressed during consultations, that adult children

[425] See, for example, *Jackson* v. *Jackson*, [1973] S.C.R. 205 (1972) 8 R.F.L. 172, 29 D.L.R. (3d) 641.

[426] In Alberta, the *Parentage and Maintenance Act*, are R.S.A. 1980, C.M-2, s.16 (2) provides that child support ends when a child reaches age 18. Note however, in the recent case of *T.(P.)* v *B. (R)* unreported, 2001 ABQB 739 August 9, 2001, Docket: Edmonton 8603-13035, Justice Watson of the Alberta Court of Queen's Bench extended child support for the benefit of a 19-year-old daughter of unmarried parents in accordance with the *Maintenance Order Act*, R.S.A. 1980, C.M-1.

In British Columbia, section 88 of the *Family Relations Act*, R.S.B.C. 1996, c. 128, creates an obligation for parents to support "the child", which is defined in section 87 as "a person who is 19 years of age or older and…unable, because of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life".

In Manitoba, the *Family Maintenance Act*, C.C.S.M., c. F20, para. 35(1)(b) provides that a "child" includes a person 18 years of age or over, under the charge of his or her parents, who "is unable by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life".

In New Brunswick, in accordance with section 113 (1) of the *Family Services Act*, 1997, c.59, s.2; 2000, c.44, s.1, support is available for a child the age of majority or over if he or she is "unable to withdraw from the charge of his or her parents or to obtain the necessaries of life by reason of illness, disability, pursuit of reasonable education or other cause".

In Newfoundland, under paragraph 37(7)(a) of the *Family Law Act*, R.S.N. 1990, c. F-2, a child at the age of majority or older may receive support if the child is under the charge of a parent and "is unable by reason of illness, disability, pursuit of reasonable education or other cause to withdraw from the parent's charge or to obtain the necessaries of life".

In Nova Scotia, support is payable to dependent children as defined in section 2 of the *Family Maintenance Act*, R.S.N.S. 1989, c. 160. A dependent child includes a child "…the age of majority [who is] unable, by reason of illness, disability or other cause, to withdraw from the charge of the parents or provide himself with reasonable needs but does not include a child twenty-four years of age or older…".

In Nunavut and the Northwest Territories, section 57 of the *Children's Law Act*, S.N.W.T. 1997, c. 14, permits support for children "the age of majority or over, but who [are] unable, by reason of illness, disability, pursuit of reasonable education or other cause, to withdraw from a parent's charge".

In Ontario, section 31 of the *Family Law Act*, R.S.O. 1990, c. F.3, creates an obligation to pay child support for the benefit of an "unmarried child who is a minor or is enrolled in a full time program of education…".

In Prince Edward Island, under the *Family Law Act*, R.S.P.E.I. 1988, c. F-2.1, as amended by *An Act to Amend The Family Law Act (No.2)*, Stats. P.E.I. 1997, c.16, parents must support children if the children are "…eighteen years of age or over, are enrolled in a full-time program of education or are unable, by reason of illness, disability or other cause, to withdraw from the charge of their parents or to obtain the necessaries of life".

In Quebec, articles 585, 586, and 587 of the *Civil Code* permit children at the age of majority or older to receive support.

In Saskatchewan, subsection 4(2) of *The Family Maintenance Act*, R.S.S. 1997, c. F-6.2, states that "on the application of a parent of a person who is 18 years of age or older, the court may order the person's other parent to pay maintenance to the claimant for the benefit of the person if the person is: (a) under the claimant's charge; and (b) unable, by reason of illness, disability, or other cause to: (i) withdraw from the claimant's charge; or (ii) obtain the necessaries of life".

In Yukon, the definition of "child" in the *Family Property and Support* Act, R.S.Y. 1986, c. 63, does not specify an age limit.

should be entitled to pursue a reasonable level of post-secondary education, which is important to a child's long-term well-being. Children of separated parents are much less likely to graduate from high school or to pursue post-secondary studies.[427]

However, during the Senate Committee on Social Affairs, Science and Technology's review of the proposed changes in Bill C-41, several members opposed the change, worrying that it would expand as well as codify the existing case law. The eventual compromise removed the words *pursuit of reasonable education* from the amendments and allowed existing case law to continue to apply.

There have been no amendments to this section of the *Divorce Act* since May 1997.

APPLICATION

Since the *Divorce Act* was enacted in 1968, judges have decided whether older children should receive child support on a case-by-case basis. The 1997 amendments had little impact on case law developments in this area.

Children under the age of majority are entitled to support unless they have withdrawn from parental charge. There is no single definition of the word *charge* but, just as under the former Act, the word considers both the children's financial dependency and the parents' control.

> In Australia, the *Family Law Reform Act* allows support to be ordered for children beyond age 18 if they need support to finish their education or because of a physical or mental disability.

Today, as before the 1997 amendments, children under the age of majority are generally entitled to support if they are dependent on their parents, but not if they are employed full time, married, or otherwise independent. Generally, if it is reasonable in the circumstances to expect the child to be self-supporting, support will be denied. However, there is no general rule and judges are able to decide each case based on the family's particular situation.

ISSUES

Support for children the age of majority or over continues to be a contentious issue.

Many say that judges have gone too far and that the Act should be amended to limit their discretion. Some argue that there should be a maximum threshold after which support is not payable, such as when the child reaches age 21 or completes a post-secondary degree. It is said that the current law makes it too hard for paying parents to plan their financial affairs because they do not know when their child support obligations may end. Moreover, restricting the court's discretion by defining a maximum threshold would produce more predictable and consistent results, per the *Federal Child Support Guidelines* objectives.

Others believe that the Act should be amended so that courts are more often required to order support for older children, given the overwhelming view of the case law that children who are reasonably pursuing their education should be supported until they have their first undergraduate degrees. For post-graduate studies, children should have to show why support should continue. Some say that eligibility should be expanded by including a phrase such as *pursuit of reasonable education*, which originally appeared in Bill C-41, particularly since these children are statistically less likely to go as far in their education.

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[427] **Judith A. Frederick and Monica Boyd, *The Impact of Family Structure on High School Completion* (Ottawa: Statistics Canada, Canadian Social Trends, Catalogue No. 11-008-XPE, 1998). See also Mary Stratton, *Literature Review on Parental Funding of Post-Secondary Education with Recommendations for Further Research* (Ottawa: Department of Justice, Child Support Team, BP06E, 1999).**

However, because families come before the court in so many different circumstances, any attempt to absolutely limit or extend child support in all cases may lead to unjust orders. Deserving older children may be denied support while other children who should be self-supporting may continue to qualify. The courts are in a unique position to review and balance all of the relevant circumstances in any given family and determine, within the context of the phrase *other cause*, whether to order support for older children.

Moreover, almost all provinces and the territories permit parents and courts to decide child support for children the age of majority or over if the separating parents were not married, or if they were married but are not asking for a divorce. In fact, in some of the provinces and territories, these laws also apply to intact families. In other words, parents who are not separated may also have a legal obligation to support their older children. Many people believe that child support under the *Divorce Act* should not be more limited than that under provincial and territorial laws.

RECOMMENDATION

No change to this definition is proposed. The Divorce Act should continue to permit parents and judges to decide whether older children qualify for support on a case-by-case basis.

SUBSECTION 2(2) OF THE *DIVORCE ACT*: CHILD OF THE MARRIAGE

BACKGROUND

The definition of *child of the marriage* in subsection 2(2) of the *Divorce Act* determines whether spouses must support children for whom they "stand in the place of parents."

> **Child of the marriage**
>
> 2.(2) For the purposes of the definition "child of the marriage" in subsection (1), a child of two spouses or former spouses includes
>
> (a) any child for whom they both stand in the place of parents; and
>
> (b) any child of whom one is the parent and for whom the other stands in the place of a parent.

Laws in most provinces and territories contain a similar definition.[428] Once there is a relationship between a spouse and a child of the other spouse, the roles and responsibilities are similar to those of other parents, including the right to apply for custody or access.

The 1968 *Divorce Act* adopted the Latin phrase *in loco parentis* to describe a situation where a person voluntarily assumes a parental role for children. This reflected the well-established legal principle that sometimes children may be eligible for support from a person who acted as their parent.[429] The 1985 *Divorce Act* replaced the words *in loco parentis* with the translation, *in the place of parents*. There have been no subsequent amendments.

APPLICATION

ISSUES

Many argue the *Divorce Act* should set out objective criteria for deciding when a spouse is standing in the place of a parent, given the rights and obligations that flow from such a finding.

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[428] For example, in subsection 1(1) of Ontario's *Family Law Act*, R.S.O. 1990, c. F-3, paragraph 1(1)(a) of P.E.I.'s *Family Law Act*, S.P.E.I., 1995, c. 12, and paragraph 2(1)(a) of Newfoundland's *Family Law* Act, R.S.N. 1990, c. F-2, a child includes "…a person whom a parent has demonstrated a settled intention to treat as a child of his or her family." In Manitoba, section 1 of *The Family Maintenance Act*, R.S.M. 1987, c. F-20, defines child as including "… a child to whom a parent stands in loco parentis". In New Brunswick, section 1 of the *Family Law Service Act*, S.N.B. 1980, c. F.2.2, says the definition of *child* includes "(d) a child to whom a person stands in loco parentis, if that person's spouse is a parent of the child". Section 1 of British Columbia's *Family Relations Act*, R.S.B.C. 1996, c. 128, imposes a child support obligation on step-parents, biological parents, and adoptive parents. However, the obligation on step-parents is qualified by temporal factors such as the requirement that the step-parent has contributed to the support and maintenance of the child for at least one year.

[429] A historical review of the doctrine of *in loco parentis* can be found in various cases, including *Carignan* v. *Carignan* (1989), 61 Man. R. (2d) 66, 22 R.F.L. (3d) 376 (C.A.) [hereinafter *Carignan* cited to Man. R.] and *Theriault* v. *Theriault* (1994), 149 A.R. 210, 2 R.F.L. (4th) 157 (C.A.) [hereinafter *Theriault* cited to A.R.], and in numerous journal articles, such as A. Diduck, "*Carignan* v. *Carignan*: When is a Father not a Father? Another Historical Perspective" (1990), 19 Man. L.J. 580.

CASE LAW

The Manitoba Court of Appeal, in *Carignan*,[430] held that a spouse could unilaterally terminate the *in loco parentis* status once the marriage to the child's natural parent had ended. However, the Saskatchewan Court of Appeal, in *Andrews* v. *Andrews*,[431] came to the opposite conclusion. The Alberta Court of Appeal also endorsed this position.[432]

In 1998, the Supreme Court of Canada, in *Chartier* decided that a step-parent[433] cannot unilaterally terminate a relationship with a stepchild solely because the step-parent ceases to have a relationship with the child's biological parent, as this is not in a stepchild's best interests. The courts must look at the nature of the relationship at the time the family functioned as a unit to determine whether a person does in fact stand in the place of a parent to a child.

The Supreme Court held that one must decide to assume the role of a parent. The courts must assess both the intention one formally expresses and the intention that can be inferred from one's actions. Does the child participate in the extended family, as would a biological child? Does the person provide financially for the child (depending on ability to pay)? Does the person discipline the child as a parent? Does the person give the impression, either explicitly or implicitly, that he or she has parental responsibilities for the child? What is the child's relationship with the absent biological parent?

The Supreme Court held that, if the child is considered to be a child of the marriage, the step-parent has the same "joint and several" obligations to that child she or he would have to biological children per the *Divorce Act*. The contribution issue should not affect the child. If one paying parent pays more than his or her share, that parent can claim a contribution against the other but still has to pay support. The biological parent's contribution should be assessed independently.

CASES APPLYING *CHARTIER*

Courts across Canada have recognized the significance of the Supreme Court's decision in *Chartier*. For example, the court in *Marud* v. *Marud*[434] stated that *Chartier* represents an important shift in the philosophy concerning individuals who stand in the place of parents. Furthermore, the court held that the *Chartier* decision re-focused the inquiry away from a step-parent's intentions and toward his or her actions and the effects of those actions on the child.

It appears that courts recognize that it is solely a question of fact whether a spouse stands in the place of a parent.[435] Courts in many provinces have been considering and applying the factors set out in *Chartier* to determine this.[436] Moreover, in *R.M.* v. *P.M.*,[437] the court held that the factors set out in *Chartier* are not exhaustive and that it is not necessary that all the factors be present. It said that each individual family situation must be carefully assessed to establish the existence of factors that define a parental relationship.

[430] *Carignan, supra* note 429.

[431] *Andrews* v. *Andrews* (1992), 97 Sask. R. 213, 38 R.F.L. (3d) 200 (C.A.).

[432] *Theriault, supra* note 429.

[433] [1999] 1 S.C.R. 242. The terms *stepchild* or *stepchildren* and *step-parent* or *step-parents* are used for ease of reference only in this document. A stepchild is a child for whom a spouse stands in the place of a parent. A step-parent is a spouse who stands in the place of a parent to a child.

[434] *Marud* v. *Marud* (1999), 182 Sask. R. 50, 2 R.F.L. (5th) 113 (Q.B.) [hereinafter *Marud* cited to Sask. R.].

[435] See, for example, *McDonald* v. *McDonald* (7 December 1999), New Westminster D040243, [1998] B.C.J. No. 3150; *McFarland* v. *McFarland* (1999), 92 O.T.C. 177, [1999] O.J. No. 1392 (Crt. Just.).

[436] See, for example, *Henderson* v. *Henderson* (7 December 1999), Penticton 14275, [1999] B.C.J. No. 2938 (S.C.); *Bruvels* v. *Guindon* (13 March 2000), Ontario 99-FL-25302, [2000] O.J. No. 875 (Sup. Crt. Just.); *Tanner* v. *Simpson* (2 July 1999), Yellowknife 6101-02512, [1999] N.W.T.J. No. 71 (S.C.).

[437] *R.M.* v. *P.M.* (2000), 193 Nfld. & P.E.I.R. 273, 8 R.F.L. (5th) 320 (Nfld. S.C.).

Courts have been attentive to the main finding from *Chartier*: a spouse who stands in place of a parent cannot unilaterally terminate his or her obligation to the children involved. For example, in *B.L.H.* v. *D.L.J.A.*,[438] it was held that, even though the children and their stepfather of six years disliked each other, the children were still entitled to financial support. Similarly, in *Cox* v. *Cox*,[439] the court held that any post-separation estrangement between the paying step-parent and his or her stepchildren is not relevant to child support.

Applying *Chartier*, courts determine the nature of the relationship when the family functioned as a unit and not at the time of the order or hearing.[440]

Cases have arisen where courts have declined to find a parental relationship. In *Marshall* v. *Marshall*,[441] the court held that the three-month relationship was too short. In *See* v. *See*,[442] the court found no evidence that the stepfather engaged in fatherly activities but merely tolerated the presence of the child as a consequence of the relationship with the child's mother.

The court in *Cook* v. *Cook*[443] said there should be a relatively high threshold for finding a parental relationship and one must be able to demonstrate or infer a fairly clear assumption of responsibility over a sufficient period of time to amount to a parental relationship. The court feared penalizing step-parents for behaving kindly or offering emotional, physical, and financial assistance to a child. Obligations to the child should only be imposed where it can be unmistakably shown that the role of the step-parent was "in substantial substitution for the natural parent's role."[444] The tendency to find parental status should be directly proportional to the length of the marriage and inversely proportional to the involvement of the natural parent. This decision has been subsequently applied.[445]

As yet, only two appeal courts have had the opportunity to apply or interpret *Chartier*. The British Columbia Court of Appeal, in *Dutrisac* [446] held that the lower court judge mistakenly read *Chartier* as precluding the court from reducing a step-parent's child support.

In the second instance, the majority of the Quebec Court of Appeal in *V.A.* v. *S.F.*[447] held that subsection 2(2) should be interpreted restrictively and that one should only find a standing in place of a parent in exceptional circumstances.[448] The court felt that, because of *Chartier*, such a finding would become absolute and automatic in the majority of cases. Overturning the lower court's decision, the majority held that the judgment was based on conflicting evidence and that the stepfather should not be forced to pay child support for at least 10 years when the marriage had lasted less than three. The judge writing the minority opinion felt *Chartier* set out the governing principles, and not absolute rules, for courts attempting to relieve the economic effects of divorce on children. Decisions should be based on an assessment of all the potential elements of a parent-child relationship, particularly a spouse's substantial involvement in the maintenance, care, and education of a child.

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[438] *B.L.H.* v. *D.L.J.A.* (2 April 2001), Chilliwack E1489, [2001] B.C.J. No. 642 (S.C.) [hereinafter *B.L.H.*].

[439] *Cox* v. *Cox* (1999), 181 Nfld & P.E.I.R. 212 (Nfld. S.C.).

[440] See, for example, *B.L.H.*, *supra* note 438; *Kotylak* v. *Kotylak* (21 June 1999), Regina 015727, [1999] S.J. No. 430 (Q.B.).

[441] *Marshall* v. *Marshall* (6 January 2000), Saint John FDSJ-799-99, [2000] N.B.J. No. 10 (Q.B.).

[442] *See* v. *See* (1999), 94 O.T.C. 150, 44 R.F.L. (4th) 306 (Crt. Just.).

[443] *Cook* v. *Cook* (2000), 182 N.S.R. (2d) 299, 3 R.F.L. (5th) 373 (S.C.).

[444] *Ibid.* at para. 28.

[445] *Baker* v. *Peterson* (29 January 2001), Halifax 001154, [2001] N.S.J. No. 52 (S.C.).

[446] *Dutrisac, supra* note 134

[447] *V.A.* v. *S.F.* (11 December 2000), Montreal 2001-0012, [2000] J.Q. no. 5556 (C.A.) [hereinafter *V.A.*].

[448] The Quebec Court of Appeal stated that the concept of "standing in the place of a parent" does not exist under Quebec civil law and has never been incorporated in the Quebec *Civil Code*. The court stated that the concept is therefore an exception that is in addition to Quebec civil law and must therefore be interpreted restrictively, like any other exception.

OTHER ISSUES

If someone mistakenly believes he is a child's biological parent, that person cannot be defined as standing in place of a parent, as such a person would not necessarily have the knowledge and intention required.[449] Similarly, adoptive parents are the child's parents, and not standing in the place of another.[450]

RECOMMENDATION

No amendments are recommended for this section.

As can be seen from the case law review, the cases are extremely fact specific and, as such, courts should analyze them case by case, applying the governing principles in Chartier. That decision offers compelling reasons why step-parents should be required to provide support to children for whom they have stood in the place of a parent. Justice Fish of the Quebec Court of Appeal has stated, "Chartier commands the judicial implementation of policy choices made by Parliament in exercising its legislative jurisdiction over marriage and divorce."[451]

Although provincial and territorial statutes use different language to impose child support obligations on persons other than natural parents, there is no fundamental difference in the way these statutes have been used. The central difference is that the provincial and territorial statutes are more inclusive, while the Divorce Act presupposes that the parties have been married and are divorcing or have already been divorced. Grandparents and unmarried cohabitants may be liable under the provincial and territorial statutes but not under the Divorce Act. Applying the Divorce Act to anyone other than divorced or divorcing persons would raise constitutional questions.

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[449] *T.A.* v. *R.C.A.* (1999), 48 R.F.L. (4th) 205 (B.C.S.C.).

[450] *Marud, supra* note 434.

[451] *V.A., supra* note 447 at page 42.

SECTION 11 OF THE *DIVORCE ACT*

BACKGROUND

Paragraph 11(1)(b) imposes a duty on the court to stay a divorce application when there are no reasonable arrangements for child support in place. This protects a child's right to reasonable support.

Paragraph 11(1)(b) was amended in 1997 by specifying that the court will consider the applicable guidelines when determining whether the child support arrangement is reasonable.

Duty of court—bars

11.(1) In a divorce proceeding, it is the duty of the court…

(b) to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made; and…

APPLICATION

ISSUE

In some situations the paying parent cannot be located or there may be a history of violence, which prohibits contact between the spouses. In such situations, it may not be reasonable to insist that child support be in place before granting the divorce.

CASE LAW

In *Zarebski* v. *Zarebski*,[452] the court, in granting the divorce, stated that despite the court's duty under paragraph 11(1)(b), it would be unrealistic, impractical, and inequitable to require the mother to get non-existent financial information from the father. Although the current situation was not ideal for the mother, she had managed to cope, and she wanted to get on with her life with her child.

In *Cole* v. *Cole*,[453] the court refused to grant the divorce until the respondent filed further income information, even though the petitioner was prepared to accept child support payments based on the available income information. Invoking 11(1)(b), the judge wrote:

> All of these incidents, including the efforts counsel has made to get appropriate documentation and documentation which would conform with the *[Federal] Child Support Guidelines* led me to the conclusion that further information was being deliberately withheld and that I should consider imputing income under the appropriate sections of the Guidelines.[454]

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[452] *Zarebski* v. *Zarebski* (1997), 29 R.F.L. (4th) 93 (Ont. Ct. Just. (Gen. Div.)).

[453] *Cole* v. *Cole* (2000), 183 N.S.R. (2d) 176 (S.C.).

[454] *Ibid.* at para. 5.

The court therefore made an order for disclosure under section 21 of the Guidelines.

RECOMMENDATION

No amendments to this section are recommended.

SECTION 15.1 OF THE *DIVORCE ACT*

BACKGROUND

Child support order

15.1(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.

Interim order

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to pay for the support of any or all children of the marriage, pending the determination of the application under subsection (1).

Guidelines apply

(3) A court making an order under subsection (1) or an interim order under subsection (2) shall do so in accordance with the applicable guidelines.

Terms and Conditions

(4) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as it thinks fit and just.

Court may take agreement, etc., into account

(5) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

(*a*) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and

(*b*) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

Reasons

(6) Where the court awards, pursuant to subsection (5), an amount that is different from the amount that would be determined in accordance with the applicable guidelines, the court shall record its reasons for having done so.

Consent orders

(7) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

Reasonable arrangements

(8) For the purposes of subsection (7), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

Section 15 of the former *Divorce Act* dealt with both child and spousal support. Bill C-41 separated them into two distinct sections (child support in section 15.1 and spousal support in section 15.2) to give effect to the *Federal Child Support Guidelines.*

Subsection 15.1(3) requires a court to make an order or interim order for child support based on the applicable guidelines.

Subsection 15.1(5) qualifies the requirement in 15.1(3), allowing a court to order a different support amount if special provisions have been made for the benefit of the child and if applying the Guidelines would be inequitable given those special provisions. Subsection 17(6.2) parallels this section by allowing the court to also consider such provisions when varying a child support order.

Subsections 15.1(7) and (8) permit the court to order a different amount if both parties agree, as long as this is reasonable given the applicable guidelines. This allows parents to negotiate a different support amount according to their particular circumstances.

APPLICATION

ISSUE

15.1(1): DISCRETION TO ORDER SUPPORT

In some appellate decisions, the term *may* in subsection 17(1) of the *Divorce Act* has been interpreted as giving the court discretion to decline ordering child support in a variation application.[455] Based on this section 17 jurisprudence, it has been successfully argued that there is a corresponding discretion under section 15.1, particularly in cases when there is a prior separation agreement or a non-*Divorce Act* court order that sets out the spouses' child support obligations.

To vary a child support order under section 17, the court must find that there has been a change in circumstances since the previous order was made. This obligation is specifically set out in subsection 17(4). Under section 15.1, because the court is dealing with an originating application (meaning that there is no previous *Divorce Act* order), there is no similar requirement for a "change in circumstance."

Some spouses had a court order or had previously signed a separation agreement before applying for support under the *Divorce Act*. Case law is unclear as to how much (if any) consideration judges should give such documents.

This was also an issue before the 1997 amendments to the *Divorce Act*. However, today a court cannot order child support by simply incorporating the child support provisions found in a pre-May 1st, 1997 agreement in the divorce judgment, without income tax implications.[456]

Therefore, case law suggests that if the court wants to maintain the prior separation agreement, it must either exercise discretion under subsection 15.1(1) and decline to make an order, or it must find that the child support provision in the separation agreement constitutes a "special provision" under subsection 15.1(5). However, the Guidelines intended for parents and the court to apply guidelines unless there were special provisions in the agreement or order. To do otherwise renders subsection 15.1(5) unnecessary.

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[455] **See the clause-by-clause review of section 17 of the *Divorce Act*, and of section 14 of the *Federal Child Support Guidelines* for further analysis.**

[456] **For any child support order or agreement made after April 30, 1997, child support payments will neither be included in, nor deducted from, income for income tax purposes.**

This has created confusion and inconsistency. In some jurisdictions, the Guidelines are applied if no special provisions are found in the separation agreement. In other jurisdictions, the court exercises discretion by declining to order child support, regardless of whether there are any special provisions. In those jurisdictions, the courts usually review the separation agreement by comparing it with the Guidelines amount and then decide which amount most benefits the child.

APPLICABLE GUIDELINES

In four designated provinces, the provincial child support guidelines are the applicable guidelines. In those provinces, the provincial guidelines are applied in *Divorce Act* cases if both parents reside in the province.[457]

In 1997, Quebec adopted a somewhat different set of child support guidelines.[458] As of May 1, 1997, Quebec was "designated," meaning that its guidelines would apply in all *Divorce Act* cases if both parents lived there. However, section 3 of Quebec's guidelines created a void in the law, because they didn't apply to cases already being processed on May 1, 1997. This issue was eventually resolved by an appeal court decision that stated that the federal guidelines would apply in the cases already before the courts on May 1, 1997.

SPECIAL PROVISIONS

Generally, the courts have interpreted the term *special provisions* consistently. However, when courts have pondered whether child support under the Guidelines would be inequitable in light of any special provisions, they have tended to find inequity only when the Guidelines amount would be lower than the amount found in the agreement or the order.

CASE LAW

15(1): DISCRETION TO ORDER SUPPORT

In *Fung-Sunter* v. *Fabian*,[459] the British Columbia Court of Appeal made numerous significant findings.

- There is discretion under subsection 15.1(1) of the *Divorce Act* to not order child support.
- When exercising the discretion under section 15.1, courts must compare the provisions of the agreement and the amount that would be ordered under the Guidelines.
- Where there is an existing separation agreement, it is not necessary to establish a "change in circumstances" when the application is brought under section 15.1 of the *Divorce Act* because it is an originating application.
- The significance of a separation agreement, on an application for child support under subsection 15.1(1), is related to subsection 15.1(5) (special provisions). A separation agreement may lead to an order not strictly in accordance with the Guidelines if it falls under 15.1(5).

Some lower courts have ruled that when there is a prior separation agreement or provincial court order, the court has discretion to not order child support. Other courts have ruled that they must order child support because it is an originating application and that no change in circumstances is required.

In *Smith* v. *Smith*,[460] the court stated that, per subsection 15.1(3) of the *Divorce Act*, when someone first applies for child support, a court "shall" make an order based on the Guidelines. The court went on to say that subsection

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[457] See "Provinces and Territories That Have Adopted the *Federal Child Support Guidelines* Under Provincial or Territorial Laws" for more information.

[458] See the comparison of Quebec and federal guidelines for more information.

[459] *Fung-Sunter* v. *Fabian* (1999), 69 B.C.L.R. (3d) 18, 48 R.F.L. (4th) 95 (C.A.).

[460] *Smith* v. *Smith* (14 November 2000), Woodstock 6081/98, [2000] O.J. No. 5017 (Sup. Ct. Just.).

15.1(5) permits a court to make an order that differs from the Guidelines amount if there are special provisions and the application of the applicable guidelines would result in an inequitable amount given those special provisions. In that particular case, no such special provision existed and therefore the court held that the separation agreement was essentially irrelevant and that support must be ordered under the Guidelines.

In *Rogers* v. *Rogers*,[461] the court, relying on *Sherman* v. *Sherman*,[462] stated that it did not accept the argument that it had the power to make an original child support order under subsection 15(1) "irrespective of whether a material change in circumstances has taken place and despite the existence of a separation agreement."[463] The court went on to say that, based on *Sherman*, the existence of the *Federal Child Support Guidelines* did not require that child support orders automatically be varied. It did, however, provide a "triggering mechanism" to permit a review of the circumstances to see whether there was enough of a change to warrant varying child support payments.

In *Close* v. *Close*,[464] the court stated that the use of the word *may* in subsections 15.1(1) and 15.1(4) left discretion with the court. However, unlike the cases mentioned above, there was no previous separation agreement in this case. The court declined to order child support in order to prevent contact between the spouses, as "the granting of a support order [was] bound to result in the harassment and interference of the recipient spouse."[465]

The cases which formerly held that the courts had discretion to act or to decline to act can no longer be taken to be the law. Unless the unique circumstances of s. 15.1(3) or 17(6.1) of the Divorce Act, relating to special provisions, can be successfully invoked, either spouse is entitled to a Guidelines-based order even in the face of a valid and subsisting support agreement.[466]

APPLICABLE GUIDELINES

Section 3 of the *Act to Amend the Civil Code of Quebec*[467] states that the new rules do not apply to cases before the court when the Act came into force. In an initial judgment, Justice Sénécal concluded that the Quebec guidelines applied to all cases before the court, including those launched before May 1, 1997.[468] Justice Dalphond, in a further decision on the same point, concluded that the federal guidelines applied to matters launched before May 1, 1997.[469] Two subsequent decisions[470] concurred with Justice Sénécal's opinion; while two others concluded that the provincial guidelines did not apply.[471]

The Quebec Court of Appeal[472] settled the question by ruling that the *Federal Child Support Guidelines* would apply:

> The provisions of the *Divorce Act*, namely "a court making a (child support) order or an interim order shall do so in accordance with the applicable guidelines" (Subsection 15.1(3)), pursuant to the coming into force on May 1, 1997, of *An Act to Amend the Divorce Act*, the *Family Orders and Agreements Enforcement Assistance Act*,

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[461] *Rogers* v. *Rogers* (17 March 2000), Ontario 1158/99, [2000] O.J. No. 1621 (Sup. Ct. Just.) [hereinafter *Rogers*].

[462] *Sherman, supra* note 279. This decision was subsequently questioned in *Bates, supra* note 51.

[463] *Rogers, supra* note 461 at para. 9.

[464] *Close* v. *Close* 215 N.B.R. (2d) 383, 50 R.F.L. (4th) 342 (Q.B.).

[465] *Ibid.* at para. 13.

[466] *Hainworth, supra* note 290, p.7-8.

[467] R.S.Q. 1996, c. 68.

[468] *K.G.* v. *L.L., Droit de la famille-2702*, [1997] R.J.Q. 1960 (S.C.).

[469] *M.F.* v. *V.M., Droit de la famille-2761*, [1999] R.J.Q. 1337 (C.A.).

[470] *Droit de la famille-2784* (19 September 1997), Hull 550-04-002110-969, 1997 Carswell Que 965 (Sup. Ct.); C.M.U.D.C. (*Droit de la famille* – 3136), [1998] R.D.F. 605 (C.A.).

[471] *Isabelle* v. *Gauvin* (29 May 1997), 500-12-000692-939 (Que. S.C.); *Droit de la famille-2794* (25 September 1997), Longueuil 505-12-016512-967, 1997 Carswell Que 1119 (Sup. Ct.).

[472] *E.F.* v. *Y.S., Droit de la famille-2789* (11 September 1997), Montreal 98-01234, [1997] A.Q. no. 3120 (C.A.).

the *Garnishment, Attachment and Pension Diversion Act* and the *Canada Shipping Act* (S.C. 1997, c. 1), are immediately applicable and must be applied to matters pending on that date.[473]

SPECIAL PROVISIONS

How the courts interpret the term *special provisions* is closely related to the issue of the court's discretion under section 15.1.

In *Hall* v. *Hall*,[474] the court stated that a "special provision" must be one that, in whole or in part, replaces the need for ongoing support for the children. Generally, the mere fact of an unequal division of property does not in itself constitute a special provision.[475] In *Demonte* v. *Demonte*,[476] the court stated that any benefit conferred by any special provision must be a financial benefit.

In *Duncan* v. *Duncan*,[477] the paying parent had relinquished her claim to a share of the other spouse's inheritance as consideration for not paying child support. The appeal court upheld the chambers judge's finding that it would be inequitable to require her to pay child support in light of that special provision in the separation agreement.

RECOMMENDATION

No amendments to this section are recommended. Over time, the issue of whether the term 'may' allows courts to not order support under the Guidelines is becoming less important, as all orders and agreements will have been made pursuant to the Guidelines, except for a few in cases provided for in the Divorce Act.

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[473] ***Ibid.*** **at para. 15 [translated by author].**

[474] ***Hall*** **v. *Hall* (1997), 35 B.C.L.R. (3d) 377, 30 R.F.L. (4th) 333 (B.C.C.).**

[475] **See, for example, *Wallace* v. *Wallace* (1998), 36 R.F.L. (4th) 428, 156 D.L.R. (4th) 762 (B.C.S.C.).**

[476] ***Demonte*** **v. *Demonte* (1998), 40 R.F.L. (4th) 57 (B.C.S.C).**

[477] ***Duncan*** **v. *Duncan* (1999), 178 D.L.R. (4th) 760, 1 R.F.L. (5th) 46 (B.C.C.A.).**

SECTION 15.3 OF THE *DIVORCE ACT*

BACKGROUND

Giving priority to child support in section 15.3 reinforces "the child-centred" approach of recent reforms and reflects the pre-existing case law giving priority to children's needs. This section recognizes and reinforces the fact that the obligation to pay child support and the obligation to pay spousal support spring from different jurisdictional bases and are independent of each other.

Priority to child support

15.3(1) Where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support in determining the applications.

Reasons

(2) Where, as a result of giving priority to child support, the court is unable to make a spousal support order or the court makes a spousal support order in an amount that is less than it otherwise would have been, the court shall record its reasons for having done so.

Consequences of reduction or termination of child support order

(3) Where, as a result of giving priority to child support, a spousal support order was not made, or the amount of a spousal support order is less than it otherwise would have been, any subsequent reduction or termination of that child support constitutes a change of circumstances for the purposes of applying for a spousal support order, or a variation order in respect of the spousal support order, as the case may be.

1997 c.1, s.2.

Subsections 15.3(2) and 15.3(3) protect spouses who might otherwise be left in poverty once child support ends.

When, because it has given priority to child support, a court makes no order for spousal support, or orders less spousal support than it normally would have, subsection 15.3(2) requires the court to record its reasons for doing so.

There was initially much speculation that the introduction of the child support guidelines would have a negative impact on spousal support awards, pushing down levels of spousal support or eliminating spousal support entirely on the basis that after the payment of increased levels of child support—which were given explicit priority over spousal support[1]—courts would tend to find limited ability to pay spousal support. Except at low-income levels, this has not proven true.

[1] See *Divorce Act*, s. 15.3(1).

C. Rogerson, "From Spousal Support Post-*Bracklow*: The Pendulum Swings Again?" (Canadian Bar Association, Toronto, 2 February 2001).

Under subsection 15.3(3), any time child support is reduced or ended, this is deemed to be a change of circumstance. The spouse can apply for a variation of the spousal support amount if an order has been made, or the spouse can apply for an original order if there is no previous spousal support order.

APPLICATION

ISSUES

As only five years have elapsed since section 15.3 came into force, it is still too early to gauge the impact of the child support priority on spousal support. However, initial findings regarding subsection 15.3(1), are positive.

There is anecdotal information about parents circumventing subsection 15.3(2) and negotiating high spousal support orders to benefit from the deduction/inclusion taxation of spousal support. However, this supposition is not supported by research findings. See Volume I, objective 1 for further discussion.

Finally, subsection 15.3(3) does not now apply to variation applications under section 17 of the *Divorce Act*. A technical amendment to the *Divorce Act* is required to resolve this problem.

CASE LAW

Courts have fairly consistently applied section 15.3 in giving child support obligations priority over spousal support obligations.[478]

Judicial discussions of section 15.3 have raised three main issues: the nature or scope of the "priority" in section 15.3; the impact that the priority in section 15.3 has had on spousal support; and the tax implications of section 15.3.

NATURE OF THE PRIORITY

Section 15.3 applies when members of the same family apply for both child support and spousal support. It does not establish priorities among sequential families. For example, if a former wife of a first marriage applies for spousal support, she does not get statutory priority over the paying parent's obligations to children of a second dissolved marriage.

Courts have clearly distinguished child support obligations from spousal support obligations. In terms of timing, the court must determine the child support before evaluating spousal support.[479] Because obligations for child support and for spousal support spring from different jurisdictional bases and are independent of each other, an overpayment of spousal support cannot be set off against child support.[480]

The courts often consider the relationship between section 15.3 and other provisions. For example, despite the priority in section 15.3, courts have held that the spousal support claim must be dealt with first if the applicant seeks increased child support on the ground of undue hardship under section 10 of the Guidelines.[481]

[478] ***Gill* v. *Gill* (3 November 1999), Chilliwack E635, [1999] B.C.J. No. 2572 (S.C.); *Andrews* v. *Andrews* (1999), 45 O.R. (3d) 577, 50 R.F.L. (4th) 1 (C.A.); *L.W.* v. *M.E., Droit de la famille-2974*, [1998] R.D.F. 261 (S.C.); *Clausen* v. *Clausen* (12 May 2000), Courtenay E0339, [2000] B.C.J. No. 1024 (S.C.); *M. (S.A.J.)* v. *M. (D.D.)* (1998), 40 R.F.L. (4th) 95, 127 Man. R. (2d) 78 (Q.B.), rev'd on other grounds (1999), 45 R.F.L. (4th) 301 (C.A.).**

[479] ***Droit de la famille-2797*, [1997] R.J.Q. 2990 (Sup. Ct.).**

[480] ***Yeo* v. *Yeo* (1999), 49 R.F.L. (4th) 450 (P.E.I. S.C.).**

[481] ***Galliford* v. *Galliford* (9 January 1998), New Westminster 98-04327, [1998] B.C.J. No. 268 (S.C.).**

Similarly, the courts appear hesitant to give priority to child support that includes the "add-ons" under section 7 of the *Federal Child Support Guidelines*. Courts have held that the priority in section 15.3 does not mean that courts should order special or extraordinary expenses under section 7 of the Guidelines to supplement the basic amount of child support payable under the applicable provincial or territorial table, if such a supplementary allocation would render the custodial spouse destitute.[482] That is, although section 15.3 requires a court to give priority to child support over spousal support, this does not suggest that an order for much-needed spousal support should yield to an order for extraordinary expenses for optional and non-essential extracurricular activities.[483]

Taking a broader approach, in *Nataros* v. *Nataros*,[484] Master Joyce stated that "[w]hile child support, including the s. 7 expenses, must be given priority over spousal support in accordance with s. 15.3(1) of the *Divorce* Act, in determining the reasonableness of the s. 7 expenses I think it is necessary to give some consideration to the issue of spousal support and to look at the overall picture."[485] An order for interim spousal support may also be reduced if there is a subsequent successful claim for special or extraordinary expenses under section 7 of the Guidelines.[486]

IMPACT OF SECTION 15.3 ON SPOUSAL SUPPORT

Section 15.3 has significantly affected the way courts have determined and allocated spousal support. The most obvious effect has been to reduce or eliminate spousal support when a paying parent must first pay child support from limited funds. The effects of subsection 15.3(1) have been different for custodial parents and non-custodial parents.

Subsections 15.3(2) and (3) have also significantly affected the ways courts consider spousal support in variation applications.

CUSTODIAL PARENTS

In keeping with the tenor of the amendments, the priority in section 15.3 may (and often does) result in an inability to pay adequate spousal support since the funds are exhausted after child support is paid. This inability can reduce or eliminate the amount of spousal support ordered.[487] Where the spousal incomes are approximately equal after the payment of child support, a court may refuse to order spousal support until the child support obligation is eliminated.[488] Although a court may deny periodic spousal support when child support obligations exhaust the paying parent's ability to pay, a lump sum spousal support payment may be a practical alternative.[489]

Since the spouse making the application is most often the custodial parent, the total amount of child and spousal support goes to the same household. No accounting is expected to take place. In the end, it is the total amount of support that matters. However, Parliament did not intend this section to provide everything a child may need or benefit from and leave the spouse destitute.[490]

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[482] *Lyttle* v. *Bourget* (1999), 178 N.S.R. (2d) 1 (S.C.); *Kaderly* v. *Kaderly* (1 August 1997), Prince Edward Island 98-06270, [1997] P.E.I.J. No. 74 (S.C.(T.D.)) [hereinafter *Kaderly*].

[483] See *Miller* v. *Miller* (30 May 1997), Victoria 98-05573, [1997] B.C.J. No. 1322 (S.C.), where the court concluded that extraordinary expenses for extracurricular activities were beyond the means of the family because of a paramount need for spousal support.

[484] *Nataros* v. *Nataros* (1998), 40 R.F.L. (4th) 308 (B.C.S.C.).

[485] *Ibid.* at para. 38.

[486] *Shentow* v. *Bewsh* (31 July 1998), Toronto 97FP236869, [1998] O.J. No. 3142 (Ct. Just. (Gen. Div.)).

[487] *Jackson* v. *Jackson* (5 August 1999), Edmonton 4803 108902 [1999] A.J. No. 985 (Q.B.); *Hernon* v. *Renaud* (5 November 1999), New Westminster D042079, [1999] B.C.J. No. 2509 (S.C.); *Mancini* v. *Mancini* (2 June 1998), Hamilton D226/96, [1998] O.J. No. 5699 (Ct. Just. (Gen. Div.)).

[488] *Rupert* v. *Rupert* (1999), 207 N.B.R. (2d) 177 (Q.B.).

[489] *Lepage, supra* note 408.

[490] *Kaderly, supra* note 482.

In the case of *Simon* v. *Simon*,[491] the court found that a spouse who is not entitled to support may get spousal support under the guise of child support. The needs of a child and a custodial parent may be so intertwined that it is impossible to separate them for support purposes. As long as the court considers child support first, it won't violate section 15.3.

NON-CUSTODIAL PARENTS

Per section 15.3, courts have denied spousal support to a non-custodial parent if it means reducing child support.[492] That is, a custodial parent's obligation to provide financially for a child of the marriage takes priority over the obligation to pay spousal support to the non-custodial parent. This may reduce the amount of spousal support that would otherwise be ordered.[493]

On the other hand, courts have also held that a non-custodial parent who must pay child support may be entitled to spousal support. In *Richter* v. *Vahamaki*,[494] J. Blair declared that a court may order a custodial parent to pay spousal support to a non-custodial parent even if this reduces or cancels the child support the non-custodial parent is required to pay under the Guidelines, once the spousal support is set off against the child support. The custodial father was ordered to pay spousal support that exceeded the child support the mother was ordered to pay.

Lockyer v. *Lockyer*[495] addressed a similar situation, with a slightly different result. It recognized that section 15.3 applies when the payer of spousal support is financially responsible and cares for the children. Robertson, J. ordered the custodial father, with whom the children resided 90 percent of the time, to pay spousal support to the non-custodial mother. Notwithstanding the mother's obligation under the Guidelines to pay child support to the father, the judge held that in light of the mother's lack of income, she didn't have to pay child support out of her spousal support.

RECORDING REASONS

The court must record why an amount of spousal support is less than it otherwise would have been because of the child support. Any future reduction or termination of child support will constitute a change in circumstances for the purpose of varying spousal support. For example, in granting a lump sum order for spousal support, the court expressly acknowledged a potential future right to periodic spousal support under subsection 15.3(3).[496]

In the case of *Pitt* v. *Pitt*,[497] the judgment was subsequently amended to reflect subsection 15.3(2). The applicant's counsel was concerned that the absence of reasons in the initial order might prevent his client from getting the support increased if and when circumstances changed. At this urging, the judge amended the original order with the following at paragraph 4:

> I did, of course, give priority to fixing child support in this instance and, having regard to the thus reduced available income of the respondent and the other factors involved in fixing the amount of spousal support as set out in my judgment, ordered spousal support in a sum less than I would have found appropriate had there been no children of the marriage. That, I believe, satisfies the requirements of the statute.

[491] (1999), 46 O.R. (3d) 349, 1 R.F.L. (5th) 119 (C.A.), leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 36.

[492] *Casabona* v. *Niochet* (26 February 1998), Ontario 98-10524, [1999] O.J. No. 1793 (Ct. Just. (Gen. Div.)); *Long* v. *Long* (1998), 161 Nfld. & P.E.I.R. 355 (S.C. (T.D.)).

[493] *Schick, supra* note 61.

[494] *Richter* v. *Vahamaki* (18 May 2000), Ontario 99-FP-249172FIS, [2000] O.J. No. 5282 (Sup. Ct. Just.).

[495] *Lockyer* v. *Lockyer* (2000), 10 R.F.L. (5th) 318 (Ont. Sup. Ct. Just.).

[496] *Lepage, supra* note 408.

[497] *Pitt* v. *Pitt* (20 August 1997), Victoria 97-14797, [1997] B.C.J. No. 1949 (S.C.).

The respondent, on the other hand, felt such application would not be affected by the lack of reasons. The judge was inclined to agree with the respondent, but could see no harm in complying with the applicant's request since subsection 15.3(2) is new legislation.

Tauber[498] also addressed the requirement for reasons. The husband supported the trial judge's decision that there should be no order for spousal support. He pointed out that, had the trial judge reduced the amount of spousal support because of the child support order, subsection 15.3(2) of the *Divorce Act* would have required him to explain the reasons why. And in the absence of such reasons, the husband argued that this could not have been why the judge didn't order spousal support.

Although the judge didn't need to decide the issue in the end, the judge doubted that subsection 15.3(2) applied. He found that the subsection applies when the paying spouse does not have the means to pay the full amount of child and spousal support. In such a case, subsection 15.3(1) directs the court to give priority to the child support. This was not a case where the court was "unable" to order spousal support because it had to give priority to child support.[499]

APPLICATIONS FOR VARIATIONS AND INTERIM ORDERS

Under subsection 15.3(3), reducing or ending child support is a material change in circumstances justifying a variation of a spousal support order.[500] That is, a court may reassess spousal support when a child is no longer entitled to support, given the paying parent's improved ability to pay spousal support. This may lead to an increase in support applications for older former spouses after children become independent.

Courts have held that if spousal support had been reduced because child support had priority, when child support ends, spousal support should go up, even if there has been no other material change in either spouse's circumstances.[501]

In *Davis* v. *Davis*,[502] the court held that changes to child support (in this case, the end of the obligation) do not automatically change spousal support. Rather, the receiving spouse must show how the change affects the spouses' needs and means. Similarly, in *Krill v. Krill*,[503] the court held that it was relevant, when varying spousal support, to weigh such factors as whether the spouse needed a house and had taken steps to get on with life after the children had gone.

This subsection may lead to an increase in nominal orders. Under subsection 15.3(1), a low-income paying spouse may not have sufficient resources to pay spousal support after paying child support. But if a court dismisses a spouse's support application altogether, he or she may not be entitled to support later.[504] In such cases, counsel will seek a nominal support order to preserve an entitlement to future spousal support. For example, a court may order a nominal $1 per year in spousal support.[505]

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[498] *Tauber*, *supra* note 102.

[499] *Ibid.* at note 102.

[500] *Erickson* v. *Erickson* (1999), 175 N.S.R. (2d) 185, 47 R.F.L. (4th) 326 (S.C.); *McLean* v. *McLean* (29 December 1997), Barrie 98-05998, [1997] O.J. No. 5315 (Ct. Just. (Gen. Div.)); *Cusack* v. *Cusack* (25 November 1999), Prince Edward Island 1101/3922, [1999] P.E.I.J. No. 90 (S.C.(T.D.)).

[501] *Smith* v. *Smith* (1998), 36 R.F.L. (4th) 419 (Ont. Ct. Just. (Gen. Div.)).

[502] *Davis* v. *Davis* (21 February 2000), Halifax 1201-49518, [2000] N.S.J. No. 86 (S.C. (Fam. Div.)).

[503] *Krill* v. *Krill* (2000), 4 R.F.L. (5th) 249 (Alta. Q.B.).

[504] See the case of *McCowan* v. *McCowan* (1995), 24 O.R. (3d) 707, 14 R.F.L. (4th) 325 (C.A.), where the issue of support entitlement was found to be *res judicata*.

[505] *Comeau* v. *Comeau* (9 October 1997), Halifax 1201-43928, [1997] N.S.J. No. 409 (T.D.); *Young* v. *Young* (1999), 175 N.S.R. (2d) 113, 49 R.F.L. (4th) 455 (S.C.).

Subsection 15.3(3) has also been interpreted as applying to interim orders of spousal support. In *Chambers* v. *Chambers*,[506] the husband submitted that any obligation to pay spousal support would detract from his ability to make the child support payments for the child in the wife's care. He also said that these payments would hurt his ability to provide for the child in his care.

The court set support at a fairly low $500 a month "because of the necessity to give priority to child support."[507] The court acknowledged that once the matter came to trial and the husband's income was clear, this interim spousal support could become permanent. The court also pointed out: "[I]f there is any reduction or termination of child support, the quantum of spousal support can be re-evaluated. This is the intent of s. 15.3(3) of the Act and I think that intent applies equally to interim orders."[508]

TAX IMPLICATIONS OF SECTION 15.3

As child support payments are now tax neutral, while spousal support payments continue to be subject to inclusion/deduction, some parents may have a financial incentive to characterize all support as spousal support.[509] Section 15.3 limits and frustrates this tendency.[510] In fact, a judge is unlikely to order spousal support and deny child support, even on consent, given the wording of section 15.3.[511]

In *Thompson* v. *Scullion*,[512] what may have been an attempt to manipulate child and spousal support backfired. The parties had agreed on an amount of spousal support but not child support. The global amount looked large enough to include both spousal support and child support. By calling the payments spousal support, they remained subject to inclusion/deduction. The wife subsequently applied for child support. The paying parent could agree that they had not addressed child support or allege the payments included both and then deal with the Canada Customs and Revenue Agency. The court held that the agreement was not a bar to child support and ordered child support.

Tax is also an issue that overlaps with assessing support variation applications. In determining a spouse's ability to pay, a court should remember that a paying spouse will be able to deduct spousal support payments when calculating income tax and thus reduce the net cost of the payments.[513] In *Hope* v. *Hope*,[514] Quinn J. held that the change in child support to tax-neutral payments was a material change in circumstances that allowed a spouse to review spousal support. The change affects the net cost to a paying parent and the net recovery by a recipient of child support, which, in turn, affects the parties' needs and means.

RECOMMENDATION

It is recommended that this section be amended to correct an oversight and ensure that it is applicable to variations under section 17 of the Divorce Act.

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[506] *Chambers, supra* note 64.

[507] *Ibid.* at para. 35.

[508] *Ibid.* at para. 35.

[509] Since May 1, 1997, child support has not been subject to any tax treatment, but a paying spouse can still deduct spousal support and the recipient must still pay tax on it.

[510] Also, the *Income Tax Act*, R.S.C. 1985, c. 1(5th Supp.), states that if an order or agreement provides for a blended support payment that does not distinguish spousal from child support, the entire payment is deemed to be child support.

[511] *Marks* v. *Marks* (24 October 2000), Edmonton 4803 115800, [2000] A.J. No. 1247 (Q.B.).

[512] *Thompson* v. *Scullion* [2000] N.B.R. (2d) (Supp.) No. 73, 7 R.F.L. (5th) 440 (Q.B.).

[513] *Halliday* v. *Halliday* (1998), 164 Sask. R. 12 (Q.B.).

[514] *Hope* v. *Hope* (28 February 2000), Ontario 7785/95, [2000] O.J. No. 853 (Sup. Ct. Just.).

SECTION 17 OF THE *DIVORCE ACT*

BACKGROUND

Section 17 gives effect to the *Federal Child Support Guidelines* while preserving the former provisions on spousal support. Subsection 17(4) specifies that the criterion for varying a child support order is a change of circumstances as provided for in the applicable guidelines.

Subsection 17(6.1) states that a court must vary a child support order according to the applicable guidelines. Section 14 of the *Federal Child Support Guidelines* sets out what constitutes a change in circumstances.[515]

Order for variation, rescission or suspension

17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; or

(b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

Factors for child support order

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

Guidelines apply

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

Court may take agreement, etc., into account

(6.2) Notwithstanding subsection (6.1), in making a variation order in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

(a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and

(b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

Reasons

(6.3) Where the court awards, pursuant to subsection (6.2), an amount that is different from the amount that would be determined in accordance with the applicable guidelines, the court shall record its reasons for having done so.

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[515] **See the clause-by-clause review of section 14.**

Consent orders

(6.4) Notwithstanding subsection (6.1), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

Reasonable arrangements

(6.5) For the purposes of subsection (6.4), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

Subsection 17(6.2) sets out an exception to this general rule. It allows a court to depart from the Guidelines amount if the result would be inequitable given special provisions that have been made for the benefit of the child.

Subsections 17(6.4) and (6.5) permit the court to order a different but reasonable amount of child support if the parties consent. The broad wording of the section is designed to encompass many different arrangements.

APPLICATION

ISSUE

The main issue with subsection 17(1) of the *Divorce Act* has been the interpretation of the word *may*.

CASE LAW

In one set of appellate decisions, the word *may* has been interpreted as giving the court discretion to make an order. Meanwhile, paragraph 14(c) of the *Federal Child Support Guidelines*[516] has been treated solely as a "triggering mechanism" allowing a court to review other circumstances to see whether things have changed enough to vary child support payments.[517]

The other set of appellate decisions interprets *may* as empowering the court to make a variation order, and paragraph 14(c) as constituting a sufficient change to vary a pre-guidelines order, unless there are special provisions under subsection 17(6.2).[518]

As a result, subsection 17(1) has not been applied consistently across the country.

Section 14 was amended twice to address this issue. Since the last amendment on November 1, 2000, court decisions have tended to view paragraph 14(c) as mandating a change to child support orders so that they comply with the Guidelines.

[516] When section 15.1 of the *Divorce Act* came into effect, it constituted a change in circumstances that could be a reason for varying a child support order made before May 1, 1997, under paragraph 14(c).

[517] See *Wang*, *supra* note 51; *Sherman*, *supra* note 51; *Parent*, *supra* note 279; *Laird*, *supra* note 279.

[518] See *Dergousoff*, *supra* note 51; *Bates*, *supra* note 51; *Vandal*, *supra* note 280.

Montalbetti [519] was a British Columbia Court of Appeal case decided after *Wang* but just before the November 1, 2000 amendments. It ruled:

> In my opinion, the chambers judge was correct in concluding that there was a sufficient change in circumstances to warrant a variation. I say that quite apart from the provision in s. 14(c) of the Guidelines that in itself may also have provided a foundation for the variation.[520]

In *O'Donnell* [521] a New Brunswick case, the court recited the amended section 14 and concluded that the paying parent did meet the test in paragraph (c) and varied the order according to the Guidelines. In *Cholodniuk*,[522] the paying parent sought to vary his pre-May 1, 1997 child support order to comply with the Guidelines. The court stated:

> A previous application to vary this judgment was dismissed on February 11, 1999. Since that time however, s. 14 of the Guidelines has been amended to clarify that a child support order made prior to May 1, 1997 constitutes a change of circumstances that gives rise to the making of a variation order. As the order that Mr. Cholodniuk seeks to vary pre-dates May 1, 1997, he has met the threshold requirement for variation.[523]

In *Turner* ,[524] the court reviewed all of the relevant jurisprudence, articles written by various legal professionals, child support communications materials from the federal Department of Justice, and the amendments to paragraph 14(c). It concluded that the Guidelines themselves were a change in circumstances entitling a spouse to vary a child support order made before the Guidelines came into effect.

Recommendation

No amendment to this section is recommended. The need to interpret the word "may" is transitory, since as time passes, there will be fewer and fewer pre-guidelines support amounts.

Furthermore, although the amendments to section 14 of the Federal Child Support Guidelines did not change section 17 of the Divorce Act, the clarification that paragraph 14(c) is, in and of itself, a change in circumstances giving rise to a variation order seems to have had the intended impact.[525] Unless the unique circumstances of subsections 15.1(3) or 17(6.1) of the Divorce Act, relating to special provisions, can be successfully invoked, either spouse is entitled to a Guidelines-based order even in the face of a valid and subsisting support agreement.[526]

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[519] *Montalbetti, supra* note 82.
[520] *Ibid.* at para. 16.
[521] *O'Donnell, supra* note 284.
[522] *Cholodriuk, supra* note 285.
[523] *Ibid.* at para. 3.
[524] *Turner, supra* note 287.
[525] *Hunt* v. *Smolis-Hunt* (6 April 2000), Edmonton 9803-0329-AC, [2001] A.J. No. 1170 (C.A.).
[526] *Hainsworth,supra* note 290.

SECTION 25.1 OF THE *DIVORCE ACT*: AGREEMENTS WITH PROVINCES

For a review of section 25.1, please refer to "Federal Funding of Family Justice Services," Volume 1.

Agreements with provinces

25.1(1) With the approval of the Governor in Council, the Minister of Justice may, on behalf of the Government of Canada, enter into an agreement with a province authorizing a provincial child support service designated in the agreement to

(*a*) assist courts in the province in the determination of the amount of child support; and

(*b*) recalculate, at regular intervals, in accordance with the applicable guidelines, the amount of child support orders on the basis of updated income information.

Effect of recalculation

(2) Subject to subsection (5), the amount of a child support order as recalculated pursuant to this section shall for all purposes be deemed to be the amount payable under the child support order.

Liability

(3) The former spouse against whom a child support order was made becomes liable to pay the amount as recalculated pursuant to this section thirty-one days after both former spouses to whom the order relates are notified of the recalculation in the manner provided for in the agreement authorizing the recalculation.

Right to vary

(4) Where either or both former spouses to whom a child support order relates do not agree with the amount of the order as recalculated pursuant to this section, either former spouse may, within thirty days after both former spouses are notified of the recalculation in the manner provided for in the agreement authorizing the recalculation, apply to a court of competent jurisdiction for an order under subsection 17(1).

Effect of application

(5) Where an application is made under subsection (4), the operation of subsection (3) is suspended pending the determination of the application, and the child support order continues in effect.

Withdrawal of application

(5) Where an application made under subsection (4) is withdrawn before the determination of the application, the former spouse against whom the order was made becomes liable to pay the amount as recalculated pursuant to this section on the day on which the former spouse would have become liable had the application not been made.

5. FEDERAL ROLE IN SUPPORT ENFORCEMENT IN CANADA

This annex provides more detail on the results of the work the federal Department of Justice did during the Child Support Initiative to support federal enforcement, described in Volume 1 of the Report to Parliament. It is organized into five parts.
Part 1 describes the different sections of the federal Department of Justice involved in support enforcement.
Part 2 discusses the amendments to federal legislation and the ongoing policy work on federal legislation.
Part 3 lists the federal initiatives to improve compliance with support obligations.
Part 4 reviews the reciprocal enforcement of family support obligations.
Part 5 reports on research activities in this area.

PART 1: DEPARTMENT OF JUSTICE SECTIONS INVOLVED IN SUPPORT ENFORCEMENT

BACKGROUND

Provincial and territorial governments established Maintenance Enforcement Programs (MEP) in the mid-1980s to provide an intermediary service for those paying family support and those receiving family support payments.

The Government of Canada then began to support enforcement through legislation. In 1983, it passed the *Garnishment, Attachment and Pension Diversion Act* (GAPDA), which removed Crown immunity for federal employees and let provinces and territories apply to have federal wages and pensions garnisheed to satisfy family support obligations.

In 1987, the *Family Orders and Agreements Enforcement Assistance Act* (FOAEA) was enacted. Under the FOAEA, the Government of Canada started using federal databases to trace and locate defaulters and helped with garnishment by intercepting federal funds such as income tax refunds and employment insurance benefits. A unit within the federal Department of Justice, the Family Law Assistance Service (FLAS), does the work behind these acts.

SUPPORT ENFORCEMENT POLICY AND IMPLEMENTATION UNIT

The Child Support Team's Support Enforcement Policy and Implementation Unit was created as part of the Child Support Initiative. It was the first time that a special unit was responsible for enforcement policy, coordination, and planning enforcement activities the Government of Canada requires to respond to the needs of families and children.

The unit's first priority was to support the 1997 amendments to the FOAEA, the GAPDA, and other statutes. Its focus then shifted to finding ways to assist support enforcement programs and to improve compliance nationally and internationally. The success of these initiatives depended on coordination with other federal departments. This section provides information on many of these initiatives.

The provinces and territories deliver MEPs, so the Unit worked with these jurisdictions through three primary forums: the Enforcement Subcommittee of the Federal-Provincial-Territorial Task Force on the Implementation of Child Support Reforms, the Federal-Provincial-Territorial Reciprocal Enforcement of Maintenance/Support Orders Working Group (REMO/RESO), and the Maintenance Enforcement Program Directors Group.

FAMILY LAW ASSISTANCE SECTION

The Family Law Assistance Section (FLAS), located in the federal Department of Justice's Civil Law and Corporate Management Sector, puts into effect the FOAEA, the GAPDA, and the *Central Registry of Divorce Proceedings Regulations* made under the *Divorce Act*. Throughout the Child Support Initiative, the FLAS has worked closely with the Child Support Team and the provinces and territories to ensure the full and proper implementation of the 1997 legislative reforms and to introduce administrative changes to further improve the enforcement of support obligations.

PART 2 (A): AMENDMENTS TO FEDERAL LEGISLATION

On May 1, 1997, FOAEA and GAPDA amendments came into effect. While the GAPDA saw only legislative changes, the FOAEA also changed to automate services to MEPs.

THE FAMILY ORDERS AND AGREEMENTS ENFORCEMENT ASSISTANCE ACT

Before May 1997, this Act provided two services: tracing and interception.

- Under Part I, information banks at Human Resources Development Canada could be searched to locate either people who breached family orders or spousal agreements, or their children. When a child was abducted, these banks could also be used in *Criminal Code* investigations.
- Under Part II, family support obligations could be satisfied by intercepting federal money that the Crown owed a debtor. Examples of such payments included income tax refunds, individual goods and services tax credits, and employment insurance payments.

The provinces and territories submitted applications for these services on special forms. Staff in the FLAS office then key-captured the information and exchanged computer tapes with most participating federal departments.

ASSESSING THE EFFECTIVENESS OF THE FEDERAL TRACING SERVICE

The 1997 amendments made Canada Customs and Revenue Agency (CCRA) databanks available for tracing under Part I. These databanks can now be searched for information on people in default of a family support provision. Such information includes residential addresses, and names and addresses of employers. The databanks could also be used in investigations of child abductions under sections 282 or 283 of the *Criminal Code*.

An analysis of the way the MEPs have used the federal tracing service over the past five years (Table 1) shows that use has varied considerably by province and territory.

Table 1: Number of Tracing Applications, by Province and Territory and by Year

	1996–1997	1997–1998	1998–1999	1999–2000	2000–2001
Alberta	10,378	4,200	2,815	323	541
Ontario	1,237	147	116	372	409
B.C.	1,327	1,763	1,465	6,609	9,154
Manitoba	488	285	497	482	589
Saskatchewan	175	701	709	581	919
Quebec	65	58	53	646	1,312
Nova Scotia	222	235	242	193	396
Newfoundland	198	333	261	197	442
New Brunswick	75	67	39	10	6
P.E.I.	0	4	2	1	2
N.W.T.	0	14	1	0	0
Yukon	2	16	44	18	0
Nunavut	1	0	0	0	1
TOTAL	14,168	7,823	6,244	9,432	13,771

In 2000, MEP employees were asked about their needs when tracing and finding debtors. This survey also provided some insight on why the MEPs vary in their use of the federal tracing service. Here are the changes MEP employees recommended:

- speedier access on the Internet;
- better confirmation and validation of social insurance number information;
- removal of the affidavit process;[527]
- better reporting of trace results;
- more current information; and
- more employment information on debtors.

Finally, the federal Department of Justice commissioned a study in British Columbia that examined the impact of adding CCRA databases to Part I of the FOAEA.[528] The study examined the way the federal tracing process and provincial system worked. It did so by collecting data on a sample of federal trace requests and tracking those requests as they moved through the federal tracing service in the FLAS and as the results came back to British Columbia. The study then assessed the usefulness and outcome from the federal trace results for those cases.

This study identified some issues:

- FLAS information often contains duplication, old information, or partial information that is redundant;
- trace results aren't always reaching front-line enforcement officers quickly enough;
- paper is still used to transmit results to front-line staff; and
- there is inadequate communication between, and education of, all parties in the system.

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[527] **Electronic filing has certainly decreased turnaround times for filing applications for tracing, interception, and licence denial. However, problems have arisen in the tracing service when applications have been filed in "batches" via file transfer protocol (FTP). A designated officer must examine each application singly to swear an affidavit, a process that decreases the efficiency of FTP. Department officials are studying ways to overcome the problem. FTP use is important for the provinces and territories, especially the larger ones, as it eliminates the need for "double entry"—the federal applications are filed automatically from their automated systems.**

[528] **Focus Consultants, *Measuring the Degree of Impact of the Addition of the Canada Customs and Revenue Agency Databases to Part I (Main Study)* (Ottawa: Department of Justice Canada, forthcoming).**

As a result of the study, British Columbia has already begun testing methods to streamline the system. These have produced better results. The percentage of useful employer addresses has increased from 5 percent, as reported in the study, to 18 percent. Even so, MEPs may not be using the present system of federal tracing to its full potential.

There are still some issues that need to be discussed and dealt with (such as incompatible computer systems, the state of provincial and inter-provincial tracing efforts, the use and usefulness of federal information, and the need for more and better locator information). This will be a priority for the MEP directors and the Department.

INTERCEPTION SERVICE

The interception service garnishees designated federal funds owing to people who have defaulted on family support orders or agreements. There have been two principal amendments to the interception provisions since the Act came into force in 1997.

First, MEPs no longer have to provide a copy of the order establishing the support provision to apply under section 28 of the FOAEA. All they now need is an application on the prescribed form and a garnishee summons. A related amendment to Part II of the *Family Support Orders and Agreements Garnishment Regulations*[529] enables MEPs to electronically serve their application to the garnishee if both the MEP and the federal Department of Justice agree. This amendment ensures that the garnishment application process is compatible with automated systems.

Second, under amendments to subsection 203(1) of the *Canada Shipping Act*,[530] the wages of a seaman or apprentice are now subject to garnishment under Part II of the FOAEA.

As shown in Table 2, from 1996–97 to 2000–01 the interception service garnisheed over $300 million for family support obligations in Canada. The amounts collected annually also increased during this period. Between 1996–97 and 2000–01, the amount garnisheed increased by 27 percent. Given these increases over the past five years and the amounts being garnisheed, it is evident that the federal interception service will continue to be an important source of money for the MEPs to pass on to families.

Table 2: Amounts Garnisheed through Part II of the FOAEA (in thousands of dollars)

	1996–97 (thousands)	1997–98 (thousands)	1998–99 (thousands)	1999–2000 (thousands)	2000–01 (thousands)
Alberta	$9,964	$11,003	$12,497	$11,866	$12,100
Ontario	$33,401	$33,750	$38,785	$40,022	$40,026
B.C.	$8,884	$10,303	$11,807	$12,228	$11,561
Manitoba	$1,590	$1,950	$2,207	$2,478	$2,601
Saskatchewan	$1,806	$1,979	$2,244	$2,340	$2,422
Quebec	$2,867	$2,490	$3,376	$4,037	$4,775
Nova Scotia	$1,468	$2,547	$2,822	$3,074	$3,363
Newfoundland	$2,084	$2,031	$2,180	$2,211	$2,261
New Brunswick	$1,672	$2,053	$2,039	$2,036	$2,286
P.E.I.	$199	$287	$333	$355	$353
N.W.T.	$591	$668	$685	$674	$542
Yukon	$182	$274	$287	$280	$305
Nunavut	.	.	.	$88	$110
Total	$64,708	$69,335	$79,262	$81,689	$82,705

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[529] SOR/88-181, (1988) 122 Can. Gaz., Part II, 1851, ss. 7(2)

[530] R.S.C., (1985), C. S-9.

In 2000-2001, 92 percent of all funds garnished were from CCRA (tax refunds and GST Individual Rebates) and Employment Insurance Program benefits. These accounted for 62 and 30 percent, respectively.

FEDERAL LICENCE DENIAL SCHEME

To deal with cases of chronic default, the Government of Canada looked into suspending or denying federal licences and certificates to wilful defaulters who were not in contact with the provincial or territorial MEP. This would force such people to contact the MEP to arrange a payment schedule.

Provincial and territorial MEPs use licence denial exclusively when other measures have failed. The MEPs can apply to the FLAS to deny or suspend licences or passports per the *Aeronautics Act* and the *Canada Shipping Act*[531]

Some characteristics of the licence denial cases at the time of application:

- The average support order has been enforceable for almost six years.
- The median amount of arrears is $12,774.
- The median number of missed payments is 38.

Before applying for licence denial, the MEP must notify the defaulter that it plans to use this method. The defaulter has 40 days to enter into an acceptable payment plan. Failing that, the MEP applies to FLAS, showing that:

- it made reasonable enforcement attempts;
- the payer has not met his or her support obligations for any three payment periods; or
- the payer has accumulated arrears of at least $3,000.

As of June 30, 2001, 949 payers had had either their passport (879) or their transport licence (70 aviation or marine licences) suspended. Another 18 debtors had both their passport and a transport licence suspended. In 70 percent of the MEP applications (8,562), the FLAS did not suspend the licence or passport but did put the person's name on a "control list" to ensure that no passport or licence would be issued to that person, if he or she applied for one.

The MEPs cancelled or withdrew 21 percent of applications, which removed people's names from the control list or allowed them to get their passport or licence back. The MEPs cancelled or withdrew these applications because the payer paid the arrears in full, because the payer satisfactorily rescheduled payments for the arrears, or because new information came to light.

Currently, approximately 450,000 support orders are registered with the MEPs. The provinces and territories estimate that, across Canada, 70 to 75 percent of cases are in default at some point during the life of the obligation. As of June 30, 2001, the FLAS had received 12,061 valid applications for federal licence and passport denial. This represents about 2.5 percent of the total MEP caseload, so the MEPs are clearly using this initiative selectively and, judging from the case characteristics, only in cases of chronic default.

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[531] R.S.C., (1985) c. A-2 and R.S.C., (1985) c. S-9.

OPERATIONAL AND SYSTEM CHANGES TO FOAEA PROCESSES AFTER MAY 1997

ELECTRONIC FILING

A procedural amendment to the Release of Information for Family Orders and Agreements Enforcement (FOAEA) Regulations[532] (May 1997) allowed MEPs to use agreed-upon electronic means to send the application and accompanying affidavit. Unlike other authorized applicants, the MEPs do not have to provide a copy of the family provision to which the application relates. This amendment reduces delays and also reduces administrative costs.

FEDERAL OPERATIONAL AND SYSTEM CHANGES

To help ensure the timely transfer of support to children and families, on May 1997 the Government of Canada funded online computer access between federal and provincial/territorial enforcement services. This made it easier for garnishment and tracing applications, and provided quicker and more standardized collection from out-of-province payers.

The FOAEA computer system was originally designed in the mid-1980s, when the Act was introduced. At that time, governments expected to garnishee $3 million to $4 million per year, with an estimated volume of 10,000 active garnishee summonses. By March 31, 1997, the program had 71,762 active garnishee summonses and was processing approximately 300,000 garnishee actions annually to collect over $65 million per year. This sharp increase in usage hurt the operations of an already outdated system. At this same time, the system was also being stressed by other elements such as the need to:

- enhance the computer interfaces with other government departments and the provincial and territorial MEPs,
- integrate the system with evolving government financial systems,
- accommodate future legislative and technical enhancements,
- improve the security and integrity of information,
- integrate the system with current industrial standards for software and hardware,
- archive and report management of information,
- provide bilingual applications, and
- address Y2K issues.

These issues, along with the increased use of the system, made it necessary to immediately redesign the system to ensure its future viability and to accommodate new elements. There was an exhaustive security review of the information that the system handled and exchanged with provincial and other source departments. This review found that existing technology would allow the system to operate on the Internet at the same security level.

From 1997 through 1999, the FOAEA computer system was re-engineered to make it work on the Web and to make it available to the provincial MEPs. This Web-enabled system has also provided the provinces with the following benefits:

- immediate access to information on FOAEA applications for tracing, garnishment, and licence denial,
- elimination of the manual application information process,
- use of the file transfer protocol (FTP) to transfer information to and from the FLAS, thus eliminating the errors and omissions that commonly arise when using manual processes or data entry on the Web, and
- an infrastructure allowing secure communication between the provinces.

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[532] SOR/87-315, (1987) 121 Can. Gaz., Part II, 2233, s. 4(2).

COORDINATING THE IMPLEMENTATION OF THE FOAEA ENHANCEMENTS AND COMPUTER LINK WITH MEPS

The FLAS had to put this system in place while integrating it into existing provincial computer systems. Because of security requirements, provinces needed to install security software that was not necessarily compatible with their existing systems. This, together with incompatibility between the FOAEA and the provincial firewalls, has led to delays in provinces using the new FLAS automated system to its full potential.

The FLAS is currently working with the provinces to solve these incompatibility problems and to explore new avenues, such as increased FTP use to transfer and exchange information that would make the system more effective.

THE GARNISHMENT, ATTACHMENT AND PENSION DIVERSION ACT

This Act is divided into two parts. Part I of the GAPDA provides for the garnishment and attachment of salaries (and certain other moneys paid to Crown employees and public officials). Each government department and Crown corporation has a division in the Act, as do National Defence, the Senate, and the House of Commons. Part II of the Act permits governments to divert pension benefits to help satisfy financial support orders.

GAPDA, PART I: GARNISHMENT AND ATTACHMENT OF FEDERAL EMPLOYEE SALARIES

Before May 1, 1997 it was necessary to serve a notice of intention on a defaulter 30 days before garnisheeing federal salaries. Amendments to Part I of the Act eliminated this requirement for federal bodies, in the case of government departments and Crown corporations (Division I) and the Senate, House of Commons and Library of Parliament (Division IV). This change made it easier for MEPs and the courts to handle the garnishment process. This amendment was consistent with garnishment processes in private industry and makes the process similar to that used currently under the FOAEA.

This change was neither monitored nor evaluated because there were not enough standardized data. Ways to put in place an automated, central system to collect standardized data are now being studied. For more information on this, see details below on the GAPDA feasibility study.

GAPDA, PART II: RESIDENCE REQUIREMENTS

Changes to section 36 in Part II of the Act removed the requirement that the applicant for pension diversion live in Canada. Sometimes, recipients were being denied pension diversion because they had moved outside the country.

GAPDA, PART II: EARLIER PENSION DIVERSION

Before May 1997, a pension benefit could only be diverted once it became payable. To address this issue, sections 35.1 to 35.4 were introduced to Part II of the Act allowing the Minister to deem amounts to be payable immediately so that they can be used to satisfy support arrears. This will occur where an applicant applies to a court for an order and satisfies the court that there is an extended pattern of non-payment and that the applicant has taken reasonable steps to enforce the financial support order.

GAPDA, PART II: ARREARS OF PAYMENT OF SUPPORT

A May 1997 amendment to section 40.1 provided that when a financial support order is an order or judgment for support arrears, more than 50 percent of the recipient's net pension benefit can be diverted if there is no limit in the provincial legislation.

PART 2 (B): ONGOING POLICY WORK RELATED TO FEDERAL LEGISLATION

CLAUSE-BY-CLAUSE REVIEW OF THE FOAEA AND THE GAPDA

Both the FOAEA (Part I came into force in 1987 and Part II in 1988) and the GAPDA (Part I was proclaimed in force in 1983 and Part II, III and IV in 1984) are being modernized so that they can address current legislative practices and developments. Where necessary, services have been streamlined and made more effective. These amendments will include technical and substantive recommendations that will rework the language to make it clearer. Information, statistics, case law, and rationales support these recommendations. In addition, the GAPDA administrative program is being reviewed for ways to improve it. The detailed recommendations for amendments are based on internal and external consultations with federal, provincial, and territorial stakeholders.

HARMONIZATION WITH THE QUEBEC *CIVIL CODE*

Because civil law and common law co-exist in Canada, the Government of Canada is harmonizing federal legislation so that English and French versions of federal legislation respect both civil law in Quebec and common law in the other provinces and territories. However, harmonization will not change the substantive law nor will it reform federal legislation. The Civil Law and Comparative Law Section of the federal Department of Justice put in place the Harmonization Program. Per its recommendations, some concepts in the FOAEA and the GAPDA will need to be amended to reflect Quebec's legal reality.

PART 3: FEDERAL INITIATIVES TO IMPROVE COMPLIANCE WITH SUPPORT OBLIGATIONS

Several federal Department of Justice initiatives have improved compliance with support obligations. This section lists the major federal initiatives.

FOAEA PART III: SECTION 76 OFFENCE

Section 76 was added to the FOAEA in May 1997. It says that anyone who is notified that his or her passport has been suspended under Part III of the Act, and who fails to return the passport to a passport office, or who subsequently uses the passport, is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding $5,000.

The Passport Office of the federal Department of Foreign Affairs and International Trade asked for this change, because passport orders made under royal prerogative do not provide the authority to follow up if the holder keeps a passport that the Passport Office has asked to have back. Now, however, a peace officer can investigate and then seize the revoked passport by getting a warrant under section 487 of the *Criminal Code*.

Due to the unknown volume of cases and resources needed to respond to this provision, the Royal Canadian Mounted Police (RCMP) conducted a two-year feasibility study to assess the costs of having officers investigate and retrieve suspended passports. During the feasibility study, the RCMP took a proactive approach. Investigators called on the residences of debtors who had not returned their suspended passports and requested the passport to be turned over to the authorities. In addition, all cases were entered on the Canadian Police Information Centre (CPIC), so that if a debtor were stopped for an unrelated incident, the officer would request that the debtor turn over his/her passport.

The study provided a sense of how well this part of the federal passport denial/suspension program is working. On the face of it, it appears that the proactive approach has had some impact. Out of some 900 investigations sent to the RCMP, 191 passports (21 percent) were recovered by them. Other indications of the success of the study are that in 85 cases out of a possible 146 investigations where the RCMP had some indication that payments had been made, follow-up with those cases with the MEP showed that over 50 percent of the $825,000 outstanding arrears and on-going payments were paid.

While it is too early to directly credit the RCMP with these payments, it is likely that debtors were motivated to work with MEPs by driver's licence denial, credit bureau reporting, possible liens or seizures against property, and so on. The MEPs indicate that they like the fact that there is follow through and enforcement against those who do not comply. The MEPs have indicated that as a result they are recovering considerable support arrears for families.

The feasibility study concluded on March 31, 2001. The federal Department of Justice and the RCMP are examining ways to continue enforcing the return of passports consistent with the results of the study.

BANK ACT AMENDMENTS

Since 1995, the provincial and territorial MEP directors have been asking for amendments to the *Bank Act* and to related banking legislation. In particular, they want changes to the requirement that MEPs serve enforcement documents at the branch or branches of the financial institution where a debtor maintains an account. This requirement caused problems when the enforcement program did not know where the debtor had accounts and assets.

Officials from the Support Enforcement Policy and Implementation Unit of the Child Support Team worked closely with federal Department of Finance officials. They developed an amendment that permitted provincial and territorial enforcement officials to serve enforcement documents at a designated office of a financial institution in each province or territory, instead of having to identify the specific branch where the debtor's account was located.

The amendment clarifies the section and amends the provision so that it will be easier for provincial and territorial authorities to enforce child and family support orders. The provisions remove the requirement that child and family support orders must be served at the branch where the debtor deposits are located. The Governor in Council will be able to regulate both the designation of one location in every jurisdiction for serving these orders and the information that must accompany such orders.

The amendments to relevant banking legislation came into force on October 24, 2001.

QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES

In fiscal year 2001–02 the Canadian Forces were expected to ask for amendments to Chapter 207 of the *Queen's Regulations and Orders for the Canadian Forces*, regarding compulsory payments. This amendment will facilitate support order enforcement by removing the requirement for a creditor to get a separate court order for support arrears. This would permit garnishment of these amounts to be administered as they are under provincial legislation, which would be consistent with the FOAEA and the treatment of the rest of the public service who are subject to the regulations made under the GAPDA.

THE FEDERAL CHILD SUPPORT GUIDELINES INTERIM REPORT OF THE STANDING SENATE COMMITTEE ON SOCIAL AFFAIRS, SCIENCE AND TECHNOLOGY

The June 1998 report of the Standing Senate Committee on Social Affairs, Science and Technology included three recommendations on enforcing child support obligations. One of the recommendations related to international agencies: "The Minister of Foreign Affairs should work to ensure that international agencies of which Canada is a member develop procedures by which child support may be enforced."

This recommendation concerned employees of the United Nations (UN) and presumably employees of other international bodies. At the time this recommendation was made in June 1998, the UN did not have procedures to permit the garnishment of a staff member's salary and pension benefits to satisfy child support orders validly obtained in the employee's home country.

The federal Department of Foreign Affairs and International Trade, through the Permanent Mission of Canada to the UN, had raised this issue with the UN on several occasions, in the context of specific cases. Other member states, including the United States, also sought access to UN staff salaries and pension benefits.

In response, on May 20, 1999, the UN Secretary-General announced that UN staff members must comply with local laws and the orders of competent courts. This included paying support for spouses, former spouses, and dependent children. Staff rule 103.18(b)(iii) permits the Secretary-General to garnishee salaries and wages for debts to third parties, including debts related to family support orders. Should the staff member fail to honour his/her family obligations, the Organization will ask the staff member to comply and submit proof of compliance with the order. In the event that proof of compliance is not submitted, the organization will commence deductions from the staff's member employment income and benefits. The amount will then be paid to the third party in accordance with the order.

UN regulations clearly regulate the privileges and immunities of members of the Secretariat and do not allow staff members any justification for not meeting their private obligations or for not observing local laws and regulations. Should any such question arise, the staff member is to immediately report the matter to the Secretary-General, who then decides how to waive that staff member's privileges and immunities.

On October 25, 2001, the UN Secretariat sent a memo to staff members (Administrative Instruction ST/AI/2000/12). This memo says that not submitting satisfactory evidence of compliance may constitute serious misconduct and lead to the imposition of appropriate disciplinary measures, as described in section 4.3 of the memo.

Canada's Permanent Mission to the UN has also asked about reform of the UN Pension Fund. On February 20, 2001, the General Assembly approved an amendment to make it easier to use this fund to enforce family support. This amendment allowed payment facilities to be used without consent from the current or former participant.

The federal Department of Foreign Affairs and International Trade has raised this issue with other international organizations of which Canada is a member. It has asked for information on how these organizations enforce child support orders. The federal Department of Justice will follow up and promote policies such as those implemented by the UN.

A second recommendation related to garnisheeing of federal pensions: "The government should explore the possibility of changing the law to permit the value of a federal pension, or a portion of it, to be paid out, as a last resort, as a lump sum to satisfy child support arrears."

This recommendation would affect these federal pension arrangements for Government of Canada employees:

- *Governor General's Act;*
- *Lieutenant Governors' Superannuation Act;*
- *Members of Parliament Retiring Allowances Act;*
- *Judges Act;*
- *Diplomatic Service (Special) Superannuation Act;*
- *Public Service Superannuation Act;*
- *Civil Service Superannuation Act;*
- *Canadian Forces Superannuation Act;*
- *Defence Services Pension Continuation Act;*
- *Royal Canadian Mounted Police Superannuation Act,* Part I;
- *Royal Canadian Mounted Police Pension Continuation Act,* parts II and III;
- Regulations made by the Governor in Council or the Treasury Board that, in the opinion of the Minister, provide for the payment out of the Consolidated Revenue Fund of a pension to be charged to the Public Service Superannuation Account that is calculated on the basis of length of service of the person to or in respect of whom it was granted or is payable;
- *Currency, Mint and Exchange Fund Act,* subsection 15(2);
- *War Veterans Allowance Act,* subsection 28(10);
- Regulations made under Vote 181 of Appropriation Act, No.5, 1961;
- An appropriation Act of Parliament that, in the opinion of the Minister, provides for the payment of a pension calculated on the basis of length of service of the person to or in respect of whom it was granted or is payable;
- *Tax Court of Canada Act;* and
- *Special Retirement Arrangements Act.*

The Treasury Board Secretariat has expressed serious reservations about the appropriateness of altering individuals lifetime retirement income for the purpose of debt settlement and is not prepared to recommend amendments at this time.

The third recommendation related to compelling individuals to file a tax return when they are in default of support obligations: "Where taxpayers are owed a refund of income tax and have not filed a return, the Minister of Revenue should respond to notices of court orders under the *Family Orders and Agreements Enforcement Assistance Act* and make a demand to file a tax return so that it may be garnisheed to pay arrears of child support."

The authority to make such a demand is relevant to the enforcement of child support because, in cases where a tax refund is due, it could be garnisheed to pay support arrears.

Recent statistics from the Canada Customs and Revenue Agency (CCRA) suggest that many people in default have not filed recent tax returns, thus avoiding trace and locate efforts and the interception of federal funds such as income tax refunds or GST rebates. As of December 31, 1999, there were 103,936 active FOAEA intercept flags. Of these filers, 45 percent (46,604) had not filed an income tax return for the 1998 tax year, and half of the 46,604 non-filers had not filed tax returns for at least three years.

The federal Department of Justice and the CCRA are examining the issue and gathering more detailed information on non-filers.

REVIEW OF THE USE OF CRIMINAL AND CIVIL SANCTIONS FOR SUPPORT DEFAULT

Although it did not specifically recommend this, the Standing Senate Committee on Social Affairs, Science and Technology did consider using criminal and civil sanctions to punish support defaulters. But the Committee questioned whether criminal sanctions would actually be used and noted that, when provinces convict people of defying a court order, these people can be sent to jail. Despite these concerns, the Committee recognizes that making default a *Criminal Code* offence would send a strong message to defaulters that society takes child support very seriously.

In response, the federal Department of Justice commissioned two studies to examine the policy, operational, and administrative issues involved when people wilfully default on support payments. One study reviewed court decisions on civil sanctions used in default hearings or in other hearings dealing with support default. It also gathered statistics on the number of default hearings between 1990 and March 2000.

In Canada, in addition to provincial civil sanction provisions for not complying with family support obligations, section 215 of the *Criminal Code* makes it an indictable offence to not maintain children (under the age of 16) after one month, if this endangers the child's life or might permanently endanger the health of the child.

Currently, the provinces and territories each use their own civil sanctions for child support default. These civil sanctions can lead to brief jail terms. There is little information on whether the threat of jail compels defaulting parents to pay. While reported cases suggest certain trends, few cases are reported each year and, furthermore, only those of topical interest are reported.

A second study examined the way other countries use criminal and civil sanctions, particularly the United States, the United Kingdom, Australia, and New Zealand. This study also summarized current civil sanctions that Canada's provinces use to put in jail those who wilfully default on their child support obligations. It also reviewed present *Criminal Code* sections that may apply in these circumstances.

The author found that Australia and New Zealand do not rely on criminal sanctions for child support default and have no plans to do so. The United Kingdom recently instituted criminal sanctions for not complying with Child Support Agency requests. These three jurisdictions see civil enforcement mechanisms as sufficient to ensure an acceptable level of child support compliance. It is rare that people are jailed in any of these countries for child support default.

The American approach has been significantly different. It is a federal criminal offence to "wilfully" fail to pay child support for a child who lives in another state. The federal and state governments apply criminal sanctions differently. Some states use only civil sanctions, whereas others rely solely on criminal sanctions, and others use both.

Amendments to the *Criminal Code* to include wilful default of support obligations are not being considered at this time. The federal Department of Justice will examine other means, such as information sharing and education, given the limits to legislative reform. Policy will be developed accordingly.

PART 4: RECIPROCAL ENFORCEMENT OF FAMILY SUPPORT OBLIGATIONS

As more separated parents become more mobile, there is a need for a coordinated national and international approach to inter-jurisdictional support enforcement. The Child Support Initiative has made such coordination a national priority.

FEDERAL-PROVINCIAL-TERRITORIAL RECIPROCAL ENFORCEMENT OF MAINTENANCE/SUPPORT ORDER (REMO/RESO) WORKING GROUP

This working group was established in January 1998 to deal with inter-jurisdictional support enforcement and to make it easier to recognize and enforce foreign support orders. This forum promotes open communication and builds cooperative working relationships among the provinces and territories. It is an important forum for exchanging reciprocity information and forms among the members and agencies that receive, vary, and enforce inter-jurisdictional support obligations. Nationally, it identifies and helps resolve administrative issues affecting inter-jurisdictional files.

Members of this working group work on communications, administrative issues, information sharing, development of uniform forms, and reciprocal arrangements with foreign states. The majority of the items on the work plan are long term in nature and require a coordinated effort to achieve success (i.e. establishment of Canadian national and international case transmittal forms).

The Department of Justice Canada plays a key role in the ongoing activities of the Group by:

- co-ordinating the development of resource information for national and international use and acting as a repository for this information;
- supporting and co-ordinating the reciprocity efforts of Canadian jurisdictions;
- initiating research efforts to identify best practices and identify barriers to inter-jurisdictional support enforcement;
- maintaining national and international contact lists; and
- maintaining a reciprocity chart outlining Canadian reciprocal arrangements with foreign states under provincial and territorial REMO/RESO legislation.

OTHER DEVELOPMENTS IN SUPPORT ENFORCEMENT RECIPROCITY

A number of other developments occurred concurrently with the establishment of the FPT REMO/RESO Working Group. The growing caseload of support enforcement programs created challenges to the enforcement of family support provisions, both domestically and internationally. Enforcing inter-jurisdictional cases and the need to improve the existing system by coordinating procedures became a priority for all governments.

At the fall 1999 meeting of justice ministers, the Manitoba minister raised the issue of enforcing inter-jurisdictional support orders. Of concern, was the need to improve the existing system by coordinating procedures among the jurisdictions. Two documents were prepared in response to the concerns raised: the *Inter-jurisdictional Maintenance Establishment and Enforcement Protocol* and the *Operations Principles and Goals* (OPG).

The Protocol sets out fundamental principles and asks parties to improve the reciprocal process for enforcing support orders. The justice ministers approved the Protocol at their September 2000 meeting, while a subcommittee dealing with enforcement started talking about the OPG, which outlines a national approach to inter-jurisdictional support issues. In essence, the OPG puts into action the protocol's principles. The Support Enforcement Policy and Implementation Unit worked extensively with provincial and territorial officials on this more operational document, which when adopted will create national standards for inter-jurisdictional enforcement.

PART 5: FEDERAL RESEARCH ON ENFORCEMENT ISSUES

Under the Child Support Initiative, studies were conducted on compliance with support obligations and the way federal enforcement policy and procedures affect the provinces and territories. Activities included:

- a national study on factors influencing the payment and non-payment of support;
- a feasibility study on a "new hire" program in Canada to provide better trace and locate information to the Maintenance Enforcement Programs (MEP);
- helping the Support Enforcement Policy and Implementation Unit by conducting a study on the ways jurisdictions process reciprocity cases; and
- developing and implementing a Maintenance Enforcement Survey that extracted data from provincial and territorial MEPs on their automated information systems and that reported on the number and type of cases, case characteristics, financial and payment histories, and enforcement activities.

NATIONAL STUDY ON REASONS PEOPLE PAY OR DO NOT PAY CHILD SUPPORT

Based on the Prince Edward Island feasibility pilot study,[533] British Columbia, Saskatchewan, Alberta, and Nova Scotia have since agreed to participate in the national study on reasons people pay or do not pay their child support.

An interim report was based on case files and interview data from MEPs in Prince Edward Island, Saskatchewan, and Nova Scotia. As expected from the Prince Edward Island results, many people do not pay because they can not pay, but in many cases there are other "willingness" factors. The study examines various factors linked to the compliance profiles of the payers. People who pay appear to share certain characteristics:

- they pay immediately after separation, rather than waiting for a formal agreement on custody and access,
- they consistently spend significant time with children after the separation;
- they are actively involved in the leisure activities of the children, as well as in decisions about care, such as decisions about schooling, medical and dental issues, and discipline; and
- they offer a "real second home" (as viewed by both the payer and the recipient) for the children, even without a formal shared custody arrangement.

Data are currently being collected from the British Columbia and Alberta enforcement programs that will double the sample of parent interviews. These data should help to test some of the findings to date and point to further research issues. The final report for this project is scheduled to be available in 2002.

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[533] **Alderson-Gill and Associates Consulting Inc. *Research on Compliance/Default with Child Support Orders and Agreements in Prince Edward Island* (Ottawa: Department of Justice, Family, Children and Youth Section, 2002, forthcoming).**

FEASIBILITY STUDY ON ESTABLISHING A NEW EMPLOYEE TRACING PROGRAM IN CANADA

On March 6, 1996, the Government of Canada announced it would help provincial and territorial governments enforce family support orders[534] by looking into a "new hire" program, called the New Employee Tracing Program. This program would flag newly hired or re-hired debtors, then quickly garnishee their income to honour child support obligations. To date, the federal Department of Justice has completed three studies on this idea:

- it reviewed new hire programs in the United States and in other Commonwealth countries,[535]
- it surveyed Canadian MEPs on the information they need for federal tracing, and
- it reviewed federal databases and recommended data sources that could be used to implement a "new hire" program in Canada.

The first study examined existing new hire programs in the United States to see how and why they worked. Here is what it found.

- New hire programs are one of several enforcement mechanisms available to support enforcement agencies.
- They should not duplicate other enforcement measures.
- New hire information must be current, accurate, and quickly transferable from employers to the MEPs, which can then send legal notices and launch collection actions before the debtors move to other jobs.
- To succeed, the programs had to involve the business community early, communicate with it, and gain its support.

The survey of MEPs' information needs found that the databases currently used to conduct a federal trace have many limitations. Since most data sources are updated only annually, the information provided through the trace is sometimes outdated or inaccurate. Due to this, the MEPs were interested in a national new-employee tracing program to find debtors who have moved to another Canadian jurisdiction or who change jobs often.

The review of potential federal databases focused on sources that provided employer information, that contained information needed to complete a valid trace (such as a valid social insurance number), and that could be shared quickly with MEPs for garnishment or other collection actions.[536] The data also had to be timely, have information on new and re-hired employees, be electronically transmitted and stored, and have reasonable coverage of the Canadian workforce.

The best source of such data is an existing program used by Investigation and Control Operations, part of Human Resources Development Canada (HRDC). This program uses files from the Report on Hires and the Automated Earnings Reporting System to detect and prevent overpayment of employment insurance benefits. Although not every business provides data to the program, since compliance is voluntary, data are national and are typically provided monthly.

A phased implementation strategy is planned which will establish a New Employee Tracing Program in partnership with the maintenance enforcement programs and HRDC. Since the FOAEA legislation already identifies HRDC as a data source, access may be gained to these files simply by amending the regulations. By using an existing enforcement program, start-up costs may be minimized and businesses are kept on side by reducing their compliance burden, since businesses will not have to gather data twice.

We will also develop procedures to transfer information to the MEPs more quickly, to help them secure garnishments.

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[534] Government of Canada. *Budget 1996: The New Child Support Package* (Ottawa: Canada Communications Group, 1996).

[535] Sharon Moyer and Tina Hotton, *Phase I Report of Feasibility Study on New Hire Programs for Canada: New Hire Programs in the United States* (Ottawa: Department of Justice, Child Support Team, CSR-1999-4E, 1999).

[536] Child Support Team, *Phase II: New Employee Tracing Program—Examination of Federal Databases Having Potential Use for Canadian New Employee Tracing Program* (Ottawa: Department of Justice, forthcoming).

RESEARCH INTO THE OPERATIONS AND ADMINISTRATIVE PROCESSES OF DOMESTIC RECIPROCITY

In late 1999, the federal Department of Justice agreed to identify key operational and administrative issues, as well as problems and gaps, related to registering and enforcing reciprocal support orders in Canada.

We tested a list of relevant issues and questions in two jurisdictions. Once the key issues and processes were finalized, the remaining provinces and territories were asked to complete a standard questionnaire. The submissions from all jurisdictions were standardized and written up in a report.[537] In a second report, a summary of the provinces' and territories' best practices, and the differences and similarities among jurisdictions' policies and procedures was prepared.

The reports cover the preparation, content, and timing of reciprocity packages; communication between provinces and clients; the handling of provisional orders; transmission of payments; registration, enrolment, and enforcement of REMO cases; and location and tracing activities.

Two reports are scheduled to be available in 2002.

STATISTICS CANADA'S MAINTENANCE ENFORCEMENT SURVEY

In the early 1990s, under the umbrella of the National Justice Statistics Initiative, the Canadian Centre for Justice Statistics (CCJS) began to explore how it could collect national family law data. In 1995, the CCJS and various MEP representatives worked on data requirements and on a collection strategy that would meet the varied needs of family law data users. They approved a set of national data requirements that became the blueprint for current data collection efforts. Since 1996, the CCJS has been working closely with all provinces and territories, providing them with the necessary substantive and technical assistance to implement the survey.

Treasury Board funded the CCJS's Maintenance Enforcement Survey of support orders registered with MEPs. These funds helped MEPs develop their administrative systems so that they could report to the survey. Since 1996, the CCJS has been giving all provinces and territories substantive and technical help with the survey.

The first public release of the survey's data is scheduled for 2002. The release will contain an introductory, analytical report with data tables, and a qualitative report that describes how the MEPs work. This first report uses survey data from five provinces to explain the survey's concepts. The CCJS wants to cover all the MEPs soon and is working with them to do so.

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[537] **Lothar Goetz, *A Comprehensive Review of Administrative/Operational Procedures for Handling REMO Cases in Canada* (Ottawa: Department of Justice, Family, Children and Youth Section, 2002, forthcoming).**

6. FEDERAL FUNDING OF PROVINCIAL AND TERRITORIAL CHILD SUPPORT, SUPPORT ENFORCEMENT, AND CHILD CUSTODY AND ACCESS PROJECTS, 1997–2001

INTRODUCTION

Established in 1996 by the federal Department of Justice, the Child Support Initiative implemented child support guidelines and new and enhanced support enforcement measures. For example, from April 1996 to March 2000, the Child Support Implementation and Enforcement Fund helped provincial and territorial governments finance some of the costs of enacting child support guidelines and new enforcement measures.

In April 2000, this fund was replaced by the Child-Centred Family Justice Fund. The new fund moved from funding child support reforms to developing and improving more integrated family law programs and services to deal with child custody and access, child support, and support enforcement issues.

This section reviews the provincial and territorial projects supported by the two funds in fiscal years 1997–98 through 2000–01. The information comes from the provincial and territorial funding proposals and narrative reports submitted to the federal Department of Justice. As it identifies only federally funded activities, it is not a complete picture of any given province's or territory's work to effect child support guidelines, to enhance enforcement programs, or to improve family law services generally.

It does, however, account for federal funding and provides some insight into the services available to divorced and separated parents. Because of the number of projects and activities covered, descriptions have been kept as concise as possible. Readers wanting more detailed information should consult evaluation reports and other cited reference documents, or contact the federal, provincial, or territorial offices responsible for developing family law services.

CHILD SUPPORT IMPLEMENTATION AND ENFORCEMENT FUND

The Child Support Implementation and Enforcement Fund made up to $50 million available for activities that helped governments implement the child support guidelines. This money allowed the provinces and territories to work with the Government of Canada on innovative, cost-effective programs, services, and procedures that help parties get child support orders and variations to existing orders.

The rest of the fund—$13.6 million—was set aside for innovative, cost-effective enforcement measures and processes, including national and international reciprocal enforcement of support orders.

The federal Department of Justice and the provincial and territorial governments established an annual population-based allocation target for each province and territory.

As part of the framework for managing the financial assistance program, federal-provincial-territorial collaboration established primary areas of activity (PAAs) for each component of the funding program. The PAAs help the Department ensure that funded activities support federal objectives, while offering the provinces and territories the benefit of predictability in their year-to-year planning.

The PAAs for the fund's implementation component were as follows:

- coordinating activities to implement the *Federal Child Support Guidelines*;

- enhancing existing client and court services to meet workload increases;
- adopting provincial and territorial guidelines that parallel the *Federal Child Support Guidelines*;
- supporting public awareness and understanding of the *Federal Child Support Guidelines*;
- working on innovative ways to meet the demand for variations to existing support agreements and orders, and for new agreements and orders; and
- monitoring the effects of the legislative changes.

The PAAs under the enforcement component were as follows:

- developing and enhancing computer systems and applications used to access services under the *Family Orders and Agreements Enforcement Assistance Act*;
- monitoring the effects of changes to enforcement mechanisms;
- supporting changes to information systems so they could feed data to the national Maintenance Enforcement Survey managed by the Canadian Centre for Justice Statistics;
- testing innovative approaches to improving enforcement mechanisms;
- delivering public legal education and information; and
- upgrading administrative systems, adding staff, and improving services to meet anticipated demands for variations and new child support orders.

CHILD-CENTRED FAMILY JUSTICE FUND

Once the Guidelines were in place, provincial and territorial governments modified existing programs and services, and tested and implemented new approaches. Many of these services can address child custody and access issues, as well as child support and maintenance enforcement. For example, many jurisdictions have created parent education programs or broadened existing programs to include child support information and to stress front-end solutions such as consent orders.

Similarly, mediation services and other alternative program delivery strategies increase the involvement of both parents in their children's lives. These services and strategies help parties resolve both child custody issues and child support cases. The Government of Canada modified the terms of reference and PAAs to include custody and access, as well as support and maintenance enforcement services.

The Child-Centred Family Justice Fund, introduced in 2000–01, has three components.

- *Family Justice Initiatives*: Activities in this component support family justice programs and services dealing with private family law matters in cases of separation and divorce. Such programs and services cover child support, support enforcement, reciprocal enforcement, and custody and access activities that promote the best interests of children.
- *Incentive for Special Projects*: This component develops alternative dispute resolution mechanisms, particularly processes to determine, vary, or recalculate the amount of child support.
- *Public Legal Education and Information, and Professional Training*: This component enhances knowledge, develops materials, and informs Canadians (including the legal community) about child support guidelines, support enforcement measures, custody and access services, and related family law matters. It also helps community organizations, professional associations, and other non-governmental groups promote public awareness and train family law professionals.

PRINCIPLES

The federal Department of Justice has identified 11 principles for all levels of government to follow as they decide what projects to propose and approve under the Family Justice Initiatives and the Incentive for Special Projects components.

- The needs and well-being of children are paramount.
- No one model of post-separation parenting will be ideal for all children.

- Programs and services must be sensitive to the fact that children and youth experience separation and divorce at different stages of development. The programs and services must protect them from violence, conflict, abuse, and economic hardship.
- An integrated approach to planning and delivering child support, support enforcement, and custody and access programs and services is encouraged to respond to the long-term service needs of children and families.
- Opportunities for early non-adversarial dispute resolution mechanisms should be encouraged.
- Activities should address the need for evaluation, project monitoring and performance measures.
- Research should have the goal to advance the family law community's knowledge on specific issues, inform policy and program discussions, assist in the development or refinement of policy or programs and aim to enhance legislative clarity.
- Participants in the family justice system (families, judiciary, bar, court staff, enforcement staff, mediators, and others) should be well informed about family justice reforms.
- A coordinated national, inter-jurisdictional and/or international approach to innovative family justice services and information sharing should be promoted.
- Alternatives or modifications to the present court dispute resolution system are needed to reduce cost and delays for parents.
- Programs and services should be efficient and cost effective for the justice system.

FAMILY JUSTICE INITIATIVES: PAAS

The Family Justice Initiatives component is structured and managed the same way as the earlier Child Support Implementation and Enforcement Fund was. In other words, each jurisdiction gets part of the available funds based on its population. It must submit and obtain approval of the projects it proposes to implement or maintain in that year, and the projects must fall within one of the eight priority areas normally eligible for funding, as follows.

- *Coordination*: The coordination of child support, support enforcement and custody and access activities.
- *Consultations*: Joint Federal-Provincial-Territorial consultations on family law.
- *Service enhancements and innovations*: The enhancement of existing or the development, testing, implementation and monitoring/evaluation of innovative child support, support enforcement and custody and access activities under an integrated services model.
- *Alternative for determining support amounts*: The enhancement of existing or the piloting and establishment of alternative dispute resolution mechanisms to determine, vary or recalculate the amount of child support.
- *Enforcement*: The enhancement of existing or the development, testing, implementation, and monitoring/evaluation of innovative support enforcement activities.
- *Reciprocal enforcement*: Provincial/territorial efforts as they relate to reciprocal enforcement.
- *Policy and research*: Legislative and policy development, research, monitoring and evaluation activities on child support, support enforcement and custody and access.
- *Public awareness and training*: Activities that promote public awareness and understanding of the child support, support enforcement and custody and access issues, procedures and services.

INCENTIVE FOR SPECIAL PROJECTS

The Incentive for Special Projects component encourages innovation among provincial and territorial services through a competitive process. This component develops alternative mechanisms for resolving disputes at the provincial and territorial levels, including processes for determining, varying, or recalculating child support. Recalculation models must be timely, affordable for parents, and accessible to parents. They should also make it easier for parents to agree on the amount of child support.

FUNDING ALLOCATIONS

In 1996–97, before Bill C-41 came into effect, the federal Department of Justice and the provincial and territorial governments established an annual allocation target for each province and territory based on its population. The original allocations have been adjusted to accommodate changes in provincial and territorial planning assumptions and experience. The Department identified small surpluses in some jurisdictions that were then made available to other jurisdictions that needed more money because of greater demand. The following table identifies the actual allocations by jurisdiction for the period ending in 1999–2000, as well as projected transfers for 2000–01 through 2002–03.

Federal Funding of Family Law Services

Child Support Implementation and Enforcement Fund and Child-Centred Family Justice Fund

Jurisdiction	1996–97	1997–98	1998–99	1999–00	2000–01	2001–02	2002–03	TOTAL
British Columbia	20,000	1,610,478	3,003,501	1,928,133	1,726,133	1,807,591	1,726,133	11,821,969
Alberta	0	1,614,476	1,675,806	1,459,368	1,419,078	1,407,998	1,279,578	8,856,304
Saskatchewan	25,350	688,287	664,305	366,844	508,698	596,844	476,698	3,327,026
Manitoba	7,000	714,719	667,358	644,300	532,530	577,156	532,530	3,675,593
Ontario	0	6,248,734	4,525,321	3,610,133	4,910,133	5,237,401	5,144,287	29,676,009
Quebec	0	4,786,673	4,776,810	3,452,735	2,826,530	4,167,892	3,427,735	23,438,375
Nova Scotia	0	462,133	709,900	439,809	417,809	481,830	439,809	2,951,290
New Brunswick	5,500	340,334	449,753	470,647	410,464	396,200	356,543	2,429,441
P.E.I.	5,000	128,118	268,001	197,430	195,000	181,765	150,000	1,125,314
Newfoundland	0	297,537	404,903	323,276	273,276	310,196	273,276	1,882,464
Yukon	0	143,118	90,000	83,000	272,647	180,391	150,000	919,156
N.W.T.	0	119,500	226,176	144,471	145,000	210,532	150,000	995,679
Nunavut	0	0	0	138,118	137,673	220,345	150,000	646,136
TOTAL	62,850	17,154,107	17,461,834	13,258,264	13,774,971	15,776,141	14,256,589	91,744,756

FAMILY JUSTICE INITIATIVES PROJECTS

The following section reviews the programs, services, and projects funded under both the Child Support Implementation and Enforcement Fund and the Child-Centred Family Justice Fund.

COORDINATION

Federal, provincial, and territorial governments have long recognized the importance of working together on family law reforms. In 1996, deputy ministers of justice and deputy attorneys general established the Federal-Provincial-Territorial Task Force on the Implementation of Child Support (FPT Task Force). This task force did national planning; coordinated policy, public awareness, research, and evaluation activities; and provided a forum for sharing information. In the same spirit, the Government of Canada has funded planning and coordination in each province and territory, as well as provincial and territorial participation in national planning and consultations.

The provinces and territories adopted a variety of committee and project management structures to meet their planning needs. British Columbia, for example, established a planning process that involved six Ministry of Attorney General branches, other ministries and agencies, and the Legal Services Society.

Manitoba's Department of Justice had two committees to oversee family law reforms. An interdepartmental committee, which was disbanded in 1999–2000, brought together provincial departments and agencies dealing with family law and child support issues. The second committee comprised representatives of the bench, the Manitoba and Canadian bar associations, and provincial departments. This committee still serves as a consultative forum for exploring policy and procedural matters affecting family law in the province.

In Saskatchewan, the Department of Justice's Policy, Planning and Evaluation Branch and an inter-departmental committee oversee child support activities and reforms.

Nine provinces and territories used fund resources to hire project coordinators or managers. Typically, these individuals consult and plan. They also participate in the FPT Task Force and its subcommittees. They often handle federal funding issues. In some cases, the project coordinators also develop and manage direct programs. For example, New Brunswick's project coordinator managed training, public information, and research activities, while in Newfoundland and Labrador, the coordinator led the review of court rules.

With the Guidelines largely in place, the provinces and territories began in 1999–2000 to set new goals. In New Brunswick, the provincial Department of Justice had the project manager expand the Domestic Legal Aid project. In Ontario, the Family Initiatives Project Unit is not being phased out, but has been assigned new responsibilities for planning and developing family law projects and services. The Unit is also managing Family Law Mediation Services, Family Law Information Services, and public legal information activities.

CONSULTATIONS

The 1997 amendments to the *Divorce Act* required a comprehensive review of the child support reforms and a report to Parliament on this review by May 1, 2002. From the outset, the federal Department of Justice planned a national consultation as part of the review process.

The federal, provincial, and territorial governments worked on consultations, as provincial and territorial governments were interested in ensuring that parents, family law professionals, and others could register their views on child-centred family law matters. Accordingly, the FPT Task Force and the Family Law Committee planned for the national consultation. In addition, a portion of the Child-Centred Family Justice Fund resources available to each jurisdiction was dedicated to supporting provincial and territorial consultations.

In 2000–01, the provincial and territorial departments responsible for family law policy and services used the federal resources to develop consultation plans appropriate to their demographic and geographic circumstances. Most assigned project teams or committees to develop these plans. And many retained consultants or assigned staff to provide strategic and logistical support to these planning bodies.

Consultation sessions were held in every province and territory and in more than 35 communities across the country. These events and the "paper-based" consultations occurred in fiscal year 2001–02.

SERVICE ENHANCEMENTS AND INNOVATIONS

Over the past four to five years, provincial and territorial governments, with federal financial support, have tested and implemented new services. They have also modified existing programs to offer divorced and separated parents ways to cooperatively and positively redefine their parenting relationships, responsibilities, and arrangements. They have also worked to reduce the stress, delays, and costs involved in arriving at child support, custody and access agreements, and orders. These efforts have ranged from making court proceedings more predictable and timely to establishing mediation services and parent education programs.

PARENT EDUCATION

Most jurisdictions created parent education programs during the earliest pilot programs in the mid-1990s. Participating parents are generally satisfied with their experience and tend to feel that the sessions should be mandatory. The research has also found some early, but tenuous, evidence of improved parenting.[538] The sessions offered through these programs provide separated and divorcing parents opportunities to learn about:

- the impact of separation on children and adults;
- ways parents can best help their children through this difficult time;
- the legal process and the range of dispute resolution options available in the justice system, including mediation and the court process; and
- how the child support guidelines work and how to find out more about them.

Typically, trained facilitators lead the sessions using a provincially developed curriculum or facilitator's guide, along with videos and handouts. In most jurisdictions offering this service, the program is readily available in larger communities, but not necessarily in smaller communities. Beyond these basics, the programs vary, as shown in the following brief profiles.

> *British Columbia*: The Family Justice Services Division of the Ministry of the Attorney General delivers both voluntary and mandatory sessions under its *Parenting After Separation* (PAS) program. The three-hour sessions are co-facilitated by a man and a woman from agencies under contract. Sessions are also offered in Cantonese, Mandarin, Punjabi, and Hindi. The voluntary sessions are available throughout the province but are being reduced as the mandatory program expands. Mandatory participation was introduced in 1998–99 as a pilot project in the Burnaby and New Westminster provincial courts and is now delivered in eight locales, with more being added as planning and resources permit. Under the mandatory program, parents must attend one PAS session before their first court appearance can be scheduled.[539]
>
> *Alberta*: The Court Services Division of Alberta Justice delivers a parenting education program in 9 communities throughout the province with plans to expand to four additional centres. It features a 6-hour seminar that helps parents understand the impact of family break-up on their children. It also suggests ways to minimize these impacts and provides information about alternative dispute resolution mechanisms, child support issues, and the Guidelines. Through the use of a practice note, the Alberta Court of Queen's Bench has made attendance mandatory, with limited exceptions.[540]
>
> *Saskatchewan*: The province's parent education program recognizes that cooperative problem solving and decision-making are integral to the well-being of the children affected. Normally, parents attend three two-hour sessions on separate evenings, but in some centres there is a single six-hour session. The sessions are co-facilitated by a social worker from Family Law Support Services and by a mediator from Mediation Services. As attendance is voluntary, the province promotes the program by distributing posters and other materials through Department of Social Services offices, churches, libraries, the courts, law offices, and other locations. While the program has not been evaluated, participants fill out questionnaires after sessions. Generally, participants have been positive, especially about the modules dealing with children's reactions to family break-up, separation, and divorce.

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[538] **B. Bacon and B. McKenzie, *Best Practices in Parent Information and Education Programs After Separation and Divorce: Final Report* (Winnipeg: Child and Family Services Research Group, February 2001).**

[539] **British Columbia Ministry of the Attorney General, *Mandatory Parenting after Separation Pilot: First Evaluation Report* (Victoria: Ministry of the Attorney General, July 1999); British Columbia Ministry of the Attorney General, *Mandatory Parenting after Separation Pilot: Final Evaluation Report* (Victoria: Ministry of the Attorney General, October 2000).**

[540] **J. Sieppert *et al.*, *An Evaluation of Alberta's Parenting after Separation Seminars* (Canadian Institute for Law and the Family, Calgary, December 1999).**

Manitoba: Staff of the Family Conciliation Branch of the Department of Family Services deliver the province's parent education program, *For the Sake of the Children*, which consists of two three-hour sessions. The introductory session, designed for all participants, covers general information about the needs of children of different ages, parenting plans, economic and legal issues, and alternatives to formal litigation. At the end of this session, participants are streamed into either a "low-conflict" or "high-conflict" second session. The high-conflict session helps parents with especially difficult relationships who will have little post-separation contact. The courts do not require that litigants attend parent education sessions. However, the Family Conciliation Branch and the Co-Mediation Project require that parents seeking mediation services first attend parent education sessions. The program has been evaluated.[541]

Ontario: Parent information sessions are offered by unified Family Court sites and through some local and community-based programs. Federal programs only support two local programs. One is a series of evening information sessions for parents and family law clients. Delivered through the Ontario Court of Justice in Toronto, the sessions were established with help from Osgoode Hall Law School and a Donner Foundation grant. The other federally supported local program is a mandatory information program from the Superior Court of Justice, Toronto. The Superior Court requires that all litigants in contested cases attend a family law information session before continuing the court proceedings. The sessions, offered by lawyers and mediators, provide information about separation and divorce, legal procedures, options for dispute resolution, and community resources. The video *Separate Ways* is used as a presentation aid in the sessions. Both programs are being evaluated.

Quebec: The provincial government has not implemented a parent education program, but there are some community-based programs. For example, Les Centres Jeunesse de Montreal offers its family mediation and assessment clients a program entitled Co-Parenting After a Separation. None of these services is supported by federal funds.

New Brunswick: The province has adopted Manitoba's parenting program, For the Sake of the Children, revising the session scripts, print documents, and video materials to accommodate differences in the two family law systems. The program, delivered by trained contract facilitators, is available in both official languages. Participation in the program is voluntary, but it is strongly encouraged by court social workers, who have contact with most of the parents during the court intake process.

Prince Edward Island: The Office of the Attorney General recruits and trains volunteers to deliver two three-hour sessions. Participation is voluntary, but those who do wish to attend are screened. Couples and individuals with histories of domestic violence are excluded. The federal Department of Justice is helping to evaluate this program.[542]

Nova Scotia: Co-facilitators, a lawyer and a mental health worker, deliver the parent education program, which involves two two-hour sessions, using the *Children in the Middle* video series. One session deals with support guidelines, non-adversarial methods of resolving family law matters, and court procedures. The other session deals with relationship and parenting issues. The program incorporates some skills building to help parents avoid conflict, especially conflict that implicates children. Participation is mandatory in three Supreme Court (Family Division) districts, but voluntary elsewhere. Nova Scotia also has a mandatory education program for parties dealing with family law matters other than child maintenance in the Supreme Court (Family Division). The sessions, delivered by court staff and volunteer mental health professionals, will provide basic information on court procedures and interpersonal issues in separation and divorce.

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[541] **B. McKenzie, *For the Sake of the Children: An Evaluation of a Parent Education Program for Separating and Divorcing Parents—Phase II Final Report* (Winnipeg: University of Manitoba, Child and Family Study Series, July 2000).**

[542] **B. Bradford, *Positive Parenting from Two Homes: Final Report Evaluation of Pilot Parent Education Program in Prince Edward Island (Background Paper)* (Ottawa: Department of Justice, Child Support Team, BP28E, 2000).**

Newfoundland and Labrador: The Parents Are Forever program involves four three-hour sessions offered in successive weeks. The first session looks at the separation experience from both the parents' and children's perspectives; the second deals with relationship and communication skills; the third and part of the fourth session teaches conflict management skills; and the last 90 minutes looks at legal issues, procedures, and alternatives. The sessions are facilitated by social workers, assisted by a lawyer who deals with the legal issues.

Northwest Territories: The Department of Justice, in cooperation with the Legal Services Board, developed a parenting-after-separation program modelled on the Alberta and British Columbia programs, modified to meet the legal and socio-economic realities of the North. The program, was delivered by contract staff, and ran as a pilot project in 1999-2000. The sessions help parents move from a self-centred to a child-centred framework, helping them improve parenting skills. The pilot project will continue in 2002.

Yukon: The Department of Justice, in partnership with the Women's Directorate and the departments of Health and Social Services and Education, developed its program using the Manitoba model. It now contracts with Partners for Children, a local service organization, to organize and run the sessions and to train additional facilitators from other organizations to deliver the program outside of Whitehorse. The program is facilitated by a social worker and a lawyer and has been presented six to eight times a year. Separate information sessions have been held for judges, lawyers and community service providers.

CHILDREN'S EDUCATION

While parent education programs focus on the needs and experience of the children affected by separation and divorce, children might also benefit from more direct services. To that end, some government and community-based agencies have developed education-information programs for children.

One such endeavour was supported through the Department of Justice Implementation and Enforcement Fund. Saskatchewan's Department of Justice developed a curriculum, facilitator's guides, and three videos for education sessions designed for three age groups (6–9; 9–12; and 12–16). The material covers information about the legal process as well as the emotional experiences and changes in relationships that follow divorce or separation. The province has made the curriculum, facilitator's guides, and supporting materials available to community groups that organize and deliver sessions for children. It has also distributed the videos to government agencies, regional library branches, district health boards, and interested community agencies.

MEDIATION

Mediation and other alternatives to formal litigation are important features of Canada's evolving family law system. All provincial and territorial governments either have or soon will have programs and procedures to ensure that parents can use the dispute resolution procedure most appropriate to their needs and circumstances. The following section highlights provincial and territorial programs and services. Unless otherwise noted, these initiatives were supported by the federal Department of Justice Implementation and Enforcement Fund and the Child-Centred Family Justice Fund.

British Columbia: The province's 31 Family Justice Centres provide mediation and other dispute resolution services for people of modest income in cases of custody, access, guardianship, child support, and spousal support. Centre employees, trained and certified as family mediators, provide the services. The province has not allocated federal funding to this program.

Alberta: The Court Services Division of Alberta Justice manages Family Mediation Services, to which parents are referred by other programs, the courts, and family law practitioners. When the parties have a child under 18 and the gross income of one of the parties is less than $40,000, the Government of Alberta provides mediation at no cost. In Edmonton and Calgary, division staff members serve as mediators, while fee-for-service professionals provide the service in other communities. Participation in mediation is always voluntary. The province estimates that approximately 1,200 couples take advantage of mediation services each year, and only a small proportion are screened out when mediation is deemed to be inappropriate. During the 2000-2001 year, full agreements were achieved in 61 percent of the 1,033 cases that proceeded to joint mediation and partial agreements were the result in 20 percent.

Saskatchewan: When ordered by the courts, Mediation Saskatchewan provides comprehensive mediation on supervised access or on a custody and access evaluation report. To others seeking mediation services, it gives pamphlets on the mediation process and on choosing a mediator, along with a Mediation Saskatchewan directory that lists all mediators in Saskatchewan.[543]

Manitoba: Beginning in 1997–98, Manitoba used federal funds to develop the Comprehensive Co-Mediation and Mediation Internship Pilot Project, which offered mediation services to separated and divorcing parents with children under 18. The project also recruits and trains mediators accredited through Family Mediation Canada. In 1998–99, the project recruited 24 interns to train and work as co-mediators (in each case a lawyer and a family relations specialist) in cases referred by the Family Conciliation Branch, courts, parent education programs, lawyers, and others.[544]In 2000–01, Manitoba Justice integrated the project into its Family Conciliation Branch, which had previously only mediated in custody and access cases. The Branch will maintain a diminished internship component and offer co-mediation services in separation and divorce cases.

Ontario: The Ministry of the Attorney General provides for voluntary family mediation through all 17 Unified Family Court locations. Private practitioners contracted by the Ministry deliver the actual mediation services and clients are charged a user fee on a sliding scale. While the province has not allocated federal resources to this program, it has used the federal funds to support two mediation programs.

- The Ontario Superior Court of Justice in Toronto maintains a roster of family mediators who are available to all court clients. The clients pay the mediators $300 per party for the first four hours of mediation (including preparation and screening), after which the mediators may charge their usual fee. Mediators also provide a minimum of 12 hours of *pro bono* mediation per year.
- In Kingston, a pilot project tested whether litigants in support variation cases should be required to attend sessions to learn about mediation and to see whether mediation would be appropriate in their circumstances. A government-funded family mediation service provided these sessions at the Kingston Family Court. The project was completed in September 1999.

Quebec: Quebec's legislation requires that married and unmarried parents attend an information session on mediation before the courts will hear their applications in disputes over child custody, access, support, or other matrimonial rights. The session informs them about the mediation process and the role of the mediator. The program allows the parties to satisfy this requirement in one of three ways: the parties can meet with a mediator of their choosing, attend a group session together, or attend separate group sessions. At the end of the session, the couple must choose between mediation and court proceedings. If they proceed with mediation, the services are provided by accredited private practitioners or by mediators employed by youth centres who deal only with cases involving children. The provincial government covers the costs of up to six sessions except in the case of an application for review of an existing order in which a maximum of three sessions is covered. Parties requiring additional sessions must pay the fees themselves. In some circumstances the courts may make mediation mandatory.

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[543] **Elizabeth A. Wilkie, *Historical Reflections and Future Directions: Saskatchewan Justice Mediation Services: Family Programs Evaluation* (January 2000).**

[544] **B. McKenzie, *Evaluation of Comprehensive Co-Mediation and Mediation Internship Pilot Project: Interim Report* (Winnipeg: University of Manitoba, Child and Family Study Series, July 2000).**

New Brunswick: The New Brunswick Family Support Service has long provided mediation, one-to-one counselling, and information services for family support clients. In 1997–98, the province expanded this service by adding six court social workers, providing them with advanced on-site mediation training. The province's priority is to keep improving its mediation services through various means, such as by developing screening tools to help parties determine whether mediation is appropriate, by producing mediation manuals, and by training court social workers.

Nova Scotia: Since 1986, mediation has been available to parents appearing in the Halifax-Dartmouth courts on applications dealing with custody, access, and support issues. As of April 6, 1999, the service expanded to the areas served by the Supreme Court (Family Division), so it now covers Cape Breton and the entire Halifax Regional Municipality. Both court staff and private practitioners provide the services, for which the client pays according to a sliding scale. The province has not used federal funds to deliver the service, but from 1997 to 2000, it did use federal funds to design a mediation program and to coordinate delivery of a mentoring program. Under the mentoring program, a certified mediator trained and supervised trainees to help them become certified and earn a place on a government roster of professional mediators.

Newfoundland and Labrador: In 2000–01, the Family Dispute Pilot Project expanded mediation and support services in custody and access cases before the Supreme Court or Family Court to western Newfoundland. Blomidon Place, a Corner Brook community health organization, delivers the services. Initially the program is providing referral services and mediation. Support application social workers are the first point of contact with families and can negotiate some consent orders and make referrals. If referred for formal mediation, a family would meet with a mediator, who can file a consent order if the parties agree on support and child custody and access issues.

Northwest Territories: The Department of Justice is exploring a pilot mediation project in Yellowknife. An initial feasibility study has been prepared.

Yukon: The Yukon Department of Justice is considering a pilot project to provide "court-based, court-connected" mediation services to parents dealing with child support, custody, and access issues. The Department retained a contractor to develop a framework dealing with issues such as: the connection between the court and the mediation service; administrative arrangements; costs to users; the selection and assignment of mediators, the fee structure; and mediator qualifications. Yukon will undertake internal discussions before initiating a pilot.

Nunavut: The Nunavut Bench and Bar Committee is developing a mediation model that reflects the territory's cultural, geographic, and economic realities through the Inuit Qaujimajatuqangit (Traditional Knowledge) Mediation Initiative. First, it brought together experienced mediators and Inuit well versed in traditional conflict resolution practices. They developed a "mediation protocol" as the foundation for expanded family law services in Nunavut. The immediate goal of the project is to train family law mediators, who will be able to provide services to help couples within their own communities.

INFORMATION AND INTAKE SERVICES

Provincial and territorial governments have a variety of programs and services to promote early resolution of child support, custody, and access issues while reducing administrative and procedural complexities. The following examples, each supported by federal funds, illustrate the ways in which the jurisdictions deliver, or plan to deliver, information and intake services to separated and divorced parents who want to establish or revise child support, custody, or access agreements and orders.

Saskatchewan: Saskatchewan established a provincial toll-free Family law line in 1997. In addition to accepting registrations for the Parent Education Program, the operator answers general questions about the Child Support Guidelines, provides information and distributes information packages and self-help child maintenance variation kits, and can suggest options such as private lawyers, legal aid, the lawyer referral line or other government agencies.

Nunavut: In 2000–01, Nunavut Justice planned to establish Iqaluit's first Family Support Office to provide maintenance, support, and counselling services. Through the Office, a "family support counsellor" will provide family justice information and mediation services in Inuktitut. Eventually, family justice information and mediation services will be available in all Nunavut communities.

Northwest Territories: There is a clerk at the information and public service office in the Yellowknife courthouse who accepts registrations for the maintenance enforcement office; processes applications for parent information sessions; prepares and sends information to staff, judges, and the public; and helps parents with child support forms, applications, and procedures.

Nova Scotia: Nova Scotia has assigned "court intake assistants" in each judicial district to help process applications to vary support orders and agreements; to track documents; and to assess whether the applicant has all the information needed under filing requirements and court rules. They also help litigants, particularly unrepresented litigants; complete court forms and filing packages; track and follow up on documents; request information from third parties; provide information on basic procedures; suggest places where people can get legal and financial advice; and ensure that draft court orders conform to the child support guidelines.

Prince Edward Island: Since 1997–98, Prince Edward Island parents have been able to ask child support information officers for information about the Guidelines and for help applying for variations or new orders.

Ontario: The province has taken steps to provide family court clients with a "single window" for information about the family justice system and family courts. At Family Law Information Centres in 53 court sites across Ontario, court intake clerks provide information; direct clients to appropriate court-based services, such as mediation programs and parenting education sessions; and refer clients to community services outside the court, such as those related to supervised access, family counselling, and domestic violence. These services help self-represented clients and resolve disputes outside the court process. Legal Aid Ontario participates in this service program, assigning advice lawyers to provide clients with summary legal advice needs.

Alberta: Since 1997–98, Alberta has maintained Family Law Information Centres in Edmonton and Calgary. The centres are operated by the Court Services Division and staffed by lawyers, judicial clerks, and information officers. The centres originally focused on child support matters, but now they help clients with any family law application, including those for child support, custody or access, spousal support, access enforcement, *ex parte* restraining orders, and emergency protection. The clerks respond to information requests, inform people about the availability and advantages of out-of-court settlements, help unrepresented individuals identify and assemble the information required for applications, and refer clients to legal and mediation services.[545]

ADMINISTRATIVE CASE MANAGEMENT PROCEDURES

Some family justice systems have improved the way they handle cases by introducing procedures similar to case management. Quebec, for example, has a program for special court clerks (called *greffiers spéciaux*), who ensure that proposed child custody and support agreements filed with the court are processed as quickly as possible. After reviewing proposed agreements involving separation or divorce matters, the clerk may ratify the agreement. However, if there is a concern that the agreement is not safeguarding the child's best interests, the clerk may ask for more information from the parents. Finally, the clerk refers the application to the court.

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[545] **Praxis, *Final Report on the Evaluation of the Court of Queen's Bench Child Support Centres* (Edmonton: Alberta Justice, March 2000).**

In Ontario, under family law rules, family case management clerks in the Ontario Court of Justice and Unified Family Court ensure that all clients are made aware of family court services, including alternatives to litigation. The 65 clerks also make sure that clients get help with court forms and proceedings; vet cases to confirm that parties have filed the appropriate documents; refer clients to community resources; and schedule hearings or case management conferences for cases that are ready to go forward.

The case management clerks offer these services immediately after a case is filed and before a judge is involved, so the parties can reconsider their dispute resolution and settlement options before litigation begins. This timing distinguishes the case management clerk's work from that of Family Law Information Centre staff members (see above). The latter give clients options for resolving their disputes and organizing their case before they enter the court process.

British Columbia is testing innovative triage sessions under new provincial Family Court Rules. The Family Justice Registry project requires all parties to attend a session with a "triage" family justice counsellor before their first court appearance, unless matters are so urgent that a court must hear the case as soon as possible. During the triage session, the counsellor assesses the circumstances, discusses different options to resolve disputes, and refers clients to mediation services.

JUDICIAL CASE MANAGEMENT

In addition to "administrative case management" programs, described above, some provinces and territories have introduced what might be termed "judicial case management" procedures.

These measures, authorized under the jurisdictions' court rules, speed along family law cases going to trial. In Alberta, either party in a separation or divorce may request case management when she or he feels that the other party is slowing the process down or that there is an impasse. If the presiding judge rules that the case needs case management, a second judge is assigned as case manager. The case manager can set court dates and speeds the case through settlement conferences or pre-trial hearings. An evaluation of the program is planned.

Manitoba has taken a somewhat different approach. Under its program, randomly selected new separation and divorce cases go through a process designed to reduce delay and expense by promoting early and fair settlements. A Family Division judge is assigned to a case, presides at the initial case conference session with the parties and their counsel, and remains available to help manage the case until it is resolved. In one evaluation, 93 percent of lawyers surveyed said the program had a positive effect on the legal proceedings and had reduced the number of contested hearings. The province plans to make the procedure, first introduced in 1995, generally available in 2001.

Judicial case management conferences are also used in the Northwest Territories, at the discretion of parties or the court. They resolve disputes without trial if possible. If a trial is required, they simplify issues to make the process more efficient and less expensive. The process is available in all civil cases, including those involving custody and access.

Ontario recently implemented new rules for Unified Family Courts and for the Ontario Court of Justice. Specially designed for family cases, these rules incorporate case management principles and emphasize early judicial intervention and early resolution of cases. Child protection cases have specific timelines.

In other domestic cases, the rules fix dates for events before trial. In two Superior Court locations outside the unified family court system, case management rules prescribe a timetable for events in the case. The case management judge has considerable power, including the power to enforce compliance with the timetable.

Early in these other domestic cases, a conference is used to schedule events, explore ways to resolve issues in disputes, and organize the disclosure of information. These case conferences will replace much pre-trial litigation.

The provinces and territories have not used federal resources for judicial case management.

SELF-HELP

In order to help individuals who wish to obtain or vary a support order without legal representation, Alberta, Saskatchewan, British Columbia, Nova Scotia, and Ontario have used federal resources to produce and distribute self-help support variation kits. In 2000–01, Nova Scotia also set up self-help workstations in three Supreme Court (Family Division) sites. There, clients can use computers and formatted forms to prepare child support applications and the requisite forms.

SUPERVISED ACCESS SERVICES

Supervised access services provide a safe setting for children to spend time with non-custodial parents or other persons, such as a grandparent, in cases where there are concerns for the safety of the child or the custodial parent. Typically, community groups provide the service; some get government funding or other forms of assistance. In 2000, supervised access was available in some cities in British Columbia, Saskatchewan, Manitoba, Ontario, Quebec, and Nova Scotia.

Ontario uses federal funds for this service, which it is expanding from 36 sites in 2000 to all 54 court districts by 2003. The services are delivered by community-based agencies such as children's mental health centres, neighbourhood support centres, the YMCA, and local children's aid societies that operate with a mix of paid staff and volunteers. The agencies get financial support from the Ministry of the Attorney General. Most referrals to supervised access programs come from the courts and lawyers for the parents. Between April 1, 1999, and March 31, 2000, approximately 29,000 visits and exchanges involving 12,100 families took place at 36 centres and satellite locations.

In 2000–01, Nova Scotia used federal funding to prepare a "best practices" manual and to work with community organizations to develop options for supervised access services. These organizations would deliver the supervised access program in areas served by the Supreme Court (Family Division).

CUSTODY ASSESSMENT

The courts may order social and psychological assessments, which give the court and the parties the independent, written information they need to decide custody and access in the child's best interests. Commonly, the assessor interviews and observes the children with each parent. The assessor then submits a report and, in many cases, recommendations on the parenting arrangement. The report becomes part of the evidence before the court and its author may be called to testify.

In 2000–01, New Brunswick was the only jurisdiction to use federal funding to support assessment services for families in financial need. The Court Services Division, which runs the service, keeps a list of qualified assessors who can help eligible clients. Other provinces also help parents gain access to assessments in custody cases. The services may be provided by social workers or mental health professionals employed by government agencies, or by private practitioners.

In October 1999, Ontario began a two-year pilot project to test a new approach to resolving the access-based disputes that occur in approximately a fifth of separations and divorces. The study examined the effectiveness of two types of intervention:

- a focused social work intervention, which identifies the conflict underlying the dispute and helps parents form a parenting plan in the child's interests, and
- a focused legal representation, which targets the legal issues before the court and provides a legal resolution in the child's interests.

Saskatchewan introduced special custody and access assessments in 2000-2001, which focus upon the child's perspective in separation and divorce. The Children's Voices reports are completed more quickly than the full custody and access reports because the assessor only interviews the child. Development of the Children's Voices reports was in response to a recurring theme in both national provincial public consultations held recently in Saskatchewan to hear the perspectives and opinions of the children who are the subjects of custody and access issues. The Children's Voices reports are only available by court order. Once ordered, a social worker interviews the child and prepares a written report for the court expressing the child's views. These assessments are designed for families whose children are of an age and maturity level that their opinions can be accurately expressed. The speed with which the reports are available benefits both the families involved and the courts.

The project was the subject of research using a randomized, future-oriented, quasi-experimental design to examine the effectiveness of the two types of focused interventions, as compared with traditional assessments. The preliminary research findings are positive.[546]

COURT FORMS AND RULES

With child support guidelines in place, most jurisdictions had to review and modify court rules and associated forms. Federal resources supported such projects in British Columbia, Alberta, Manitoba, Ontario, and the Atlantic provinces.

These projects not only accommodated the *Divorce Act*; but also cut red tape to introduce administrative efficiencies and, more importantly, reforms that allowed and encouraged alternatives, such as mediation, that support the broad objectives of child-centred family law services. Nova Scotia and New Brunswick, for example, make it easier for parents to reach agreements and to have them processed. British Columbia, which adopted an entirely new set of rules for provincial courts, allowed for such special procedures as family law triage counsellors. Ontario, after a similarly comprehensive review, provided for case management in all family cases and, in particular, made the forms easier for everyone to understand and use, especially self-represented litigants.

Provincial and territorial governments trained judges, court staff, and members of the family law bar. They also published public legal information materials for family law clients and the public. In addition, many changes triggered improvements of court information management systems, as was the case with Manitoba's auto-order project.

PROVINCIAL CHILD SUPPORT GUIDELINES

British Columbia, New Brunswick, Yukon, and Newfoundland and Labrador used the Child Support Implementation and Enforcement Fund when setting up their guidelines, a task that included doing policy work and consultations beforehand, training court personnel and family law professionals, publishing public information materials, and introducing procedural and administrative changes.

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[546] **R. Birnbaum and D. Moyal, *Visitation Based Disputes Arising in Separation and Divorce: Differential Intervention* (Ottawa: Department of Justice, 2000).**

AUTOMATED ORDERS

In 2000, Manitoba implemented its automated orders (auto-orders) system, beginning in Winnipeg's Masters Maintenance Enforcement Court and, subsequently, throughout the Court of Queen's Bench, Family Division. The system ensures that the language of orders is clear and consistent. It also makes the procedure quicker and more efficient.

The first phase of this project, begun in 1997–98, developed standard order clauses to eliminate ambiguities. The clauses can also feed into a system to capture data needed for the Maintenance Enforcement Program. Orders must use the standard clauses, unless a court expressly approves an exception.

The second phase, in 1998–99, introduced electronic filing and the production of automated orders in the courtroom. Following this phase, the province prepared for automation generally. The auto-orders system was supported by communications and training activities directed to internal users (court staff) and external users (law firms), by external testing, and by refinements to court rules.

Ontario also used federal resources to study auto-orders. In 1998–99, it tested the automated preparation of child support orders in family law proceedings. The pilot found that, to succeed in the province's family court system, a system would have to automate all family orders. The Ministry of the Attorney General decided to defer such a project.

In 2000–01, Nunavut's Family Law Working Group used federal resources to plan an auto-order system based on Manitoba's. The project produced draft orders that courts have to review and approve before a pilot project begins.

INFORMATION SYSTEMS

Quebec and Newfoundland and Labrador used federal funds to add capacity to their administrative information management systems to respond to the new child support guidelines. In addition to installing more equipment, the Quebec Department of Justice developed a database of all family-related child support and mediation cases, while Newfoundland and Labrador developed a new case management computer system to automate manual reporting procedures and make them more efficient.

STRATEGIES FOR COPING WITH WORKLOAD INCREASES

When the *Federal Child Support Guidelines* came into force, provincial and territorial governments faced a resulting increase in applications to vary child support orders and agreements. Ontario and British Columbia addressed the resulting demand for information by creating new positions: intake clerks in Ontario and child support clerks in British Columbia. In both provinces, the clerks helped clients by distributing information kits, by responding to enquiries, and by helping prepare court documents, among other activities. In 2000–01, the intake clerks in Ontario were phased out, as Family Law Information Centres and case management clerks were brought on-stream. British Columbia phased out some of the child support clerk positions the previous year.

Saskatchewan, rather then creating new positions with specialized functions, hired more court clerks to deal with increased workloads. It also modified the existing court clerk position as needed to deal with the new guidelines.

The Yukon Department of Justice established the Child Support Guidelines Information Office in the Whitehorse courthouse and by setting up a dedicated phone line. It provided information on the guidelines, on tax changes, and on settlement options. It also helped applicants complete applications and get financial information, and it referred clients to other services. The position was discontinued due to limited demand; information is currently available from the project officer and the Maintenance Enforcement Program office in the Whitehorse courthouse.

Since 1993, Newfoundland and Labrador has helped social assistance recipients apply for and get support orders by assigning them social workers from the Department of Human Resources and Employment.

The service was expanded in 1997–98. The social workers began accepting original and variation applications, helping applicants collect and collate financial disclosure documentation, and preparing agreement documents. In addition, the workers now meet with parents, individually or jointly, to try to mediate or negotiate an agreement. If such an agreement is reached, a worker drafts a consent order for the courts to confirm.

The province is keeping these services for now. However, after it has finished evaluating the program,[547] it will explore options for integrated services, such as the Corner Brook project involving the community mental health program, Blomidon Place. That project is described in the mediation section of this document.

In Alberta, the Department of Justice used federal funding to deal with workload increases related to policy and program planning activities. The department's Family Law Branch assigned a lawyer to develop proposals for policy and procedural changes, to act as a resource to litigation counsel, and to continue educating legal and other personnel. It also assigned two lawyers to work part time with the courts, with the Maintenance Enforcement Program, and with Alberta Children's Services to develop new policies, protocols, and forms.

To respond to the increased demand from parents waiting to get an appointment with court-based alternative dispute resolution services, New Brunswick redesigned the court social worker service. It transferred the responsibility for paralegal work from the social worker to dedicated paralegal staff working directly for Legal Aid New Brunswick, thus freeing the social worker to focus on screening, mediation, and settlement services.

LAWYER REFERRAL LINE

In 1997–2000, the Law Society of Saskatchewan maintained a toll-free line that gave callers a list of local family lawyers who offered half-hour consultations for a nominal fee (usually $25 or so). The service helped low- and middle-income people to get variations, even if they were not eligible for legal aid services. The Law Society responded to an average of 16 calls per month from April 1997 to January 1998. Subsequently, the demand for service dropped to an average of one to five calls per month. As a result, in 1998–99, the special line was discontinued and the service has since been managed through the society's general enquiry line.

FINANCIAL INFORMATION SERVICES

In 1997, New Brunswick established a child support information centre in Moncton, where a roster of duty counsel and a local tax specialist held clinics every Thursday evening. The demand for services, especially of the tax specialist, was very low and the program was redesigned so that legal services were delivered only on referral from Family Support Services and the tax specialist was available only on the referral of a duty counsel. In 1998–99, the revised service was made available in eight communities.

In 1997–98, Prince Edward Island first retained an accountant as a financial counsellor to help the court and court staff determine incomes, particularly in complex cases, per the Rules of Court. While the Guidelines were being introduced, the accountant also trained staff.

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[547] ***The Final Evaluation Report: Support Application Worker Program*** **(St. John's: Department of Human Resources and Employment, 2000).**

ALTERNATIVE MECHANISMS FOR DETERMINING OR VARYING CHILD SUPPORT AMOUNTS

The child support amounts set out in agreements and orders can be modified as the personal and financial circumstances of separated and divorced parents and their children change. Normally, the procedures followed to vary an order parallel those used to determine the original arrangements. One applies to the court and a judge modifies the arrangement. Several jurisdictions have tried to simplify the process for all concerned by revising procedures, by trying pilot projects, or by doing both. Some of these innovations have been based on a "recalculation" procedure made possible by section 25.1 of the *Divorce Act*. For more information, please refer to the section later in this document called "Pilot Administrative Mechanisms to Recalculate Child Support and an Overview of Experiences or Models in Other Jurisdictions."

Under section 25.1 the federal Minister of Justice can designate a provincial or territorial child support service "to recalculate, at regular intervals, in accordance with the applicable guidelines, the amount of the child support order on the basis of updated income information." The recalculated child support amount comes into effect within 31 days, unless one of the parents applies to have the matter reviewed by the court.

CHILD SUPPORT VARIATION PROCEDURES

Three provinces have projects to handle child support variation applications using procedures of the kind envisioned by section 25.1 of the *Divorce Act*.

- Manitoba's Family Law Branch is considering a pilot project in which a team of legal and administrative officers will provide for the administrative recalculation of support amounts.
- British Columbia's Ministry of the Attorney General has a pilot project in Kelowna that offers a comprehensive child support recalculation service. The service will be offered to parents to get or vary an original child support order. An important element of this extra service will be formal links with the Family Maintenance Enforcement Program, Parenting After Separation, Debtor's Assistance, legal advice lawyers and the courts.
- Newfoundland and Labrador has established Family Justice Services Western, a partnership with a local community health organization, to deliver education, mediation, and counselling services to children and families with issues related to custody, child support, access, or spousal support.

Four jurisdictions have used federal resources to create quicker and less onerous child support variation and recalculation procedures.

- Nunavut Justice has standardized forms, improved information services, and individualized assistance with document preparation, all to make variations less burdensome.
- In Nova Scotia, intake assistants assess each case to find candidates for mediation and conciliation services that help parents agree on recalculation. Any resulting agreement is formalized as a consent order under court rules.
- New Brunswick is exploring to develop an administrative hearing mechanism to deal with child support variations. Under the proposed procedure, a hearing officer would be able to compel parties to appear at the hearing and to disclose information.
- Saskatchewan plans to develop a dispute resolution service to help low-income clients of the Maintenance Enforcement Office vary or recalculate their child support orders.

CHILD SUPPORT CALCULATION SOFTWARE

Commercial software has been developed to calculate support payments under child support guidelines. Most jurisdictions use this software to help the judiciary, court staff, and others make quick and accurate calculations. Several jurisdictions (British Columbia, Alberta, Saskatchewan, Quebec, the Northwest Territories, Nova Scotia, and New Brunswick) have used a portion of their federal funds to buy a site license for the software, to train users, and, in some cases, to lease computers.

ENFORCEMENT ACTIVITIES

Provincial and territorial governments established maintenance enforcement programs (MEP) in the mid-1980s to provide an intermediary service for those paying and receiving support. In most provinces, MEPs get the payment from the debtor and forward it to the creditor once it has been cleared through a trust account. Sometimes, the debtor doesn't pay regularly, on time, or at all, in which case the MEP tries to trace and locate the debtor to get the money. To this end, legislatures have given MEPs the authority to recover the support owing from assets by letting them garnishee income and restrict access to privileges such as motor vehicle licences.

In 1997, the Government of Canada amended the *Family Orders and Agreements Enforcement Assistance Act* (FOAEA) and other statutes to introduce measures such as licence suspension procedures. In addition, the federal Department of Justice helped the provinces and territories study ways to strengthen enforcement measures through legislation and programs. This collaboration has made enforcement more effective. In Quebec, the MEP (administered by the Ministère du Revenu du Québec) allows, in certain cases, advance payments to be made in order to insure a regular flow of money to recipients. These payments are done in the name of the payor.

FOAEA ACCESS

The federal Department of Justice administers the FOAEA through the FOAEA Unit in Ottawa. The MEPs use three of the unit's services: tracing, interception, and licence denial.

- The tracing service uses designated federal databases to find debtors' residential addresses and their employers.
- The interception service allows for the garnishment of designated federal payments, including income tax refunds, employment insurance benefits, old age security, Canada Pension Plan benefits, interest on regular Canada savings bonds, and money from selected Agriculture and Agri-Food Canada programs.
- The licence denial service, implemented in 1997, processes MEP applications to suspend and deny Canadian passports and federally issued licences, such as aviation and navigation certificates. A debtor must owe at least $3,000 or be three payments in arrears.

To make the services more efficient, the FOAEA program uses an information management system and has procedures that let MEP staff ask for and get FOAEA services over the Internet. For this to work, MEPs had to adapt their own information management and communications systems to automate file and data exchange with the FOAEA system. Typically, this meant changes in service delivery procedures, in system development and design, in acquisition of equipment and of information management and security software, and in staff training. All of the jurisdictions, except Manitoba and Nunavut, used federal funds to do this.

MAINTENANCE ENFORCEMENT SURVEY

As part of the Child Support Initiative, the Canadian Centre for Justice Statistics launched the national Maintenance Enforcement Survey, which collects and publishes national information about support compliance and enforcement. In addition to developing a centralized data processing and reporting system, the Centre contracted with the provinces and territories to find ways to extract maintenance enforcement data from their databases.

Governments will use these data for policy and program development, research, and evaluation. The academic community, non-governmental organizations, and the general public will also use the data. This aggregate survey collects this information about MEP cases:

- the compliance and arrears status of payers, according to the amount due;
- the amounts of money and proportions received;
- for cases in arrears, the percentage of dollars due received and the time since the last payment;
- the number of cases in which the recipient has payments assigned to social assistance;
- the types of enforcement activities used, by volume;
- information about default hearings;

- descriptive information about the people involved (such as median age, number of children, and gender);
- the proportion of cases involving reciprocal maintenance enforcement; and
- the authority (*Divorce Act* or provincial or territorial statute) under which the support order was made.

Prince Edward Island, Yukon, Quebec, Ontario, Nova Scotia, the Northwest Territories, British Columbia, New Brunswick, and Alberta each used federal Department of Justice funds to design and implement system changes to meet the Centre's requirements.

MAINTENANCE ENFORCEMENT SYSTEM DEVELOPMENT

Provincial and territorial MEPs handle thousands of transactions daily. To do so, the MEPs depend on effective automated information and financial management systems. As laws, procedures, and service standards change, they must update, upgrade, or even replace some systems. Since 1997, the Government of Canada, using federal Department of Justice funds, has supported this critical work in all jurisdictions.

The following samples show how jurisdictions are developing information systems to make their MEPs more effective and efficient.

> *Alberta*: Justice Alberta retained systems consultants to assess its needs and do a business analysis that improved its 15-year-old tracking system.
>
> *New Brunswick*: The province modified its existing system to ensure year 2000 compliance and improved table maintenance capabilities. As well it consolidated the eight regional databases to improve service to clients.
>
> *British Columbia* – The Family Maintenance Enforcement Program made changes to the program's system to implement electronic commerce, a new systems methodology, a review of the system architecture and production of auto-generated letters.
>
> *Newfoundland and Labrador:* The province is replacing the program's mainframe system with a distributed-server system that Department of Human Resources and Employment staff will use.
>
> *Northwest Territories*: The territorial government bought computers and applications to process data and manage the program. Its in-house technical support is also adapting existing applications so the maintenance enforcement system can deliver the required data.
>
> *Nunavut*: Nunavut Justice began linking its MEP to court files and related computer records.
>
> *Ontario*: The Family Responsibility Office developed a way to use its case management system on Windows, so that users can scan case documents and attach them to users' screens. Other new tools reduce delays and let users generate letters and reports. The Office wanted to ensure that the private lawyers it retains for maintenance enforcement proceedings have timely case management information, so they can now dial into the agency's mainframe. This remote access system required software and telecommunications safeguards to protect personal data.
>
> *Prince Edward Island*: The province updated its accounting software to track arrears information more accurately.
>
> *Quebec*: The province is implementing a service improvement plan, beginning with a review of the performance and capacity of its maintenance enforcement computer system to reduce delays, improve collections and attain a more consistent level of payments. The program's financial system was reengineered to ensure accurate reports and acceptable financial controls.

Saskatchewan: The Maintenance Enforcement Office ensured Y2K compliance, improved its table maintenance capabilities, and performed the new functions required by legislative changes.

Yukon: The territory's Department of Justice looked into adapting another jurisdiction's system to replace its outdated maintenance enforcement computer system, hoping this would save time and money. However, doing so turned out to be more expensive than building an entirely new system, which the territorial government is now contracting to have done.

ELECTRONIC BANKING

Alberta, British Columbia, Nova Scotia, Prince Edward Island, Quebec, and Saskatchewan have new electronic banking procedures and applications that, typically, can pre-authorize payment arrangements for debtors and can reduce collection costs and delays by directly depositing funds into creditors' accounts.

British Columbia's experience illustrates the many stages in developing and implementing electronic banking procedures. In 1997–99 the province retained consultants to study ways to automate Treasury Branch transactions. This would allow for automatic withdrawals from paying parents' bank accounts, coded invoices for paying parents through selected institutions, direct deposit to recipients' accounts, electronic fund transfers from attachees, and direct payment of maintenance through key-account services. The province continued to pursue electronic banking in 2000–01, a process that included setting up direct deposit arrangements for payments to recipients and online and telephone banking systems to benefit payers.

IMPROVED COLLECTION MECHANISMS

Several jurisdictions have used federal funds to help MEPs find debtors and collect arrears.

Yukon: The Department of Justice, on a trial basis, hired a tracking investigative officer to reduce the collection problems associated with the seasonal nature of the Yukon workforce. The officer used government databases and field investigations to locate defaulters.

New Brunswick: The New Brunswick Department of Justice negotiated access to databases maintained by other provincial departments to help it find debtors.

British Columbia: The Family Justice Programs Division improved its information systems to get the information needed to attach provincial funds owing to defaulting payers, to automate tracing procedures, and to support provincial enforcement legislation, which covered driver's licence non-renewal or denial, as well as credit bureau reporting.

Alberta: As a result of program reviews in 1997 and 1998, Alberta introduced a special investigations unit that screens and refers delinquent accounts to contracted collection services. The unit also seeks and executes third-party judgments and audits collections for the program.

Alberta has improved collections by using default hearings. The province's *Maintenance Enforcement Act* allows the MEP to serve a summons on a defaulting debtor requiring him or her to appear before the court to:

- show the court why the maintenance order should not be enforced;
- be examined under oath about her or his finances; and
- show why he or she should not be jailed for wilfully defaulting on payments.

Default hearings are held before a master of the Court of Queen's Bench, who can issue court orders when other collection efforts have failed and when program authorities believe the debtor can pay but will not. Where possible, a senior collection officer meets with the debtor before the hearing to negotiate a reasonable payment plan, so that the full hearing will not be necessary. If there is a hearing, the MEP is represented by its legal counsel who, along with the master, can examine the debtor under oath.

Ontario: The Family Responsibility Office negotiated with provincial government agencies, such as the Ontario Motor Vehicle Industry Council and CORPAY, Government of Ontario Pay and Benefits to get information to help it trace defaulters. In each case, the Office and the other agency have negotiated freedom of information responsibilities and memoranda of understanding.

The Family Responsibility Office also tested the use of private collection agencies. The results were good and it will expand the project. Now, companies selected through a bidding process will collect arrears in cases that have been delinquent for six or more months.

Quebec: In 1999–2000, the province's MEP considered tracking debtors by negotiating agreements among the provinces and territories that would provide inter-jurisdictional access to motor vehicle licensing databases. Doing so would allow MEPs to process enforcement applications more quickly, to improve staff productivity, to increase the number of cases processed, and to improve client service.

NEW ENFORCEMENT MEASURES

As a result of the 1997 amendments, MEPs can now apply to have passports and certain federal licences withdrawn or denied if the holder or applicant is three months or more or at least $3,000 in arrears on support payments. This is expected to motivate the defaulter to comply. For the same reason, provincial and territorial authorities have similar enforcement measures affecting licences and privileges under provincial laws. Sometimes, provinces have used federal resources for these strategies.

Saskatchewan: Provincial legislation lets the Maintenance Enforcement Office report defaulters to the credit bureau. Legislation also improved the way the province withholds its licences, by assigning a licence withholding clerk to monitor case files and identify defaulting debtors who meet the criteria for licence withholding. This clerk can also prepare notices and start withholding action.

New Brunswick: Both provinces (Saskatchewan and New Brunswick) have used federal funds to study such new enforcement tools as licence denial and credit bureau reporting.

Ontario: The Family Responsibility Office began planning for major changes to its information management system by making it easier to withhold driver's licences.

British Columbia: The province implemented six new enforcement provisions in 1998–99: credit bureau reporting, driver's licence withholding, payment conferencing (meaning meetings to get paying parents to comply voluntarily), personal property registry liens, data matches with possible income sources, and enforcement against corporations. These measures will help the program pursue delinquent debtors who cannot be located, who "hide behind a corporate veil," or who do not have regular incomes.

MEETING SERVICE DEMANDS

Alberta, Quebec, and New Brunswick each used federal resources to deal with the increased number of child support variations under child support guidelines.

RESPONDING TO CLIENT ENQUIRIES

MEPs deal with many calls from paying and receiving parents asking about the status of their accounts.

To cope, several MEPs have introduced automated telephone systems, frequently referred to as interactive voice response (IVR) systems. The IVR services operate 24 hours a day, 7 days a week to give clients access to case information and to payment information, as well as to information about enforcement legislation and other topics. Typically, clients register for the service and get a personal information number (PIN), which keeps personal information secure. During office hours, clients who cannot get what they want from IVR systems can speak to enforcement staff or leave a detailed message asking for help.

Prince Edward Island, Ontario, New Brunswick, Nova Scotia, the Northwest Territories, Alberta, and British Columbia used federal resources for their IVR systems, covering anything from installing hardware to preparing scripts for the IVR systems. New Brunswick is planning on using federal funds to design, install and/or maintain their IVR system and targeting implementation for April 1, 2002.

Some jurisdictions are also looking at providing information to clients over the Internet. The first such program, Alberta's MEP Accounts Online project, started in September 2000 with federal funding. It lets creditors and debtors find out about the last four payments, ask for a statement, report a change of address, and e-mail inquiries or comments. The system complements the IVR system and the existing services provided by collection officers. Prince Edward Island is designing a similar system.

IMPROVING CLIENT SERVICES

Provincial and territorial support enforcement bodies used federal resources to evaluate and enhance client services.

Quebec: In 1998–99 and 1999–2000, the province's MEP hired 12 recent graduates, eight specializing in family law and four in accounting, to do outreach work with its staff and clients through face-to-face meetings, telephone calls, and other means. They provided information on the MEP, addressed concerns, and gathered suggestions for program improvements. The MEP also studied a range of measures to help it better meet client needs.

Saskatchewan: In 2000–01, the Maintenance Enforcement Office hired two client service representatives to answer questions and complaints and to routinely contact new registrants, making sure that registrants are familiar with the office's services and procedures.

British Columbia: The Family Justice Programs Division surveyed receiving and paying parents to identify systemic client relation problems and to track client satisfaction. Surveyed paying parents included those who were exemplary and those who had never complied. The survey uncovered ways to improve the program, to decrease debtor resistance, and to improve client knowledge of federal and provincial enforcement initiatives.

In 2000–01, British Columbia's Family Maintenance Enforcement Program established an outreach project to evaluate ways to further enhance client services. Under the project, the MEP assigned enforcement officers to work with Family Law Centres in the Lower Mainland and to serve centre clients. The enforcement officers will participate in case conferences, meet with individual clients, and conduct payment conferences.

Ontario – In 2000-2001, the Family Responsibility Office conducted outreach sessions and workshops targeted to specific clients or client service provider groups. FRO staff provided legal outreach sessions to Family Law Association, the CBAO, the Family Bench and Bar and new panel lawyers.

STAFF TRAINING AND SUPPORT

British Columbia, Alberta, and Quebec used federal resources for staff training and related activities. British Columbia, for example, developed guidelines to help staff who negotiate voluntary payments. Alberta published a biweekly newsletter on procedural and policy changes. In 1999–2000, Alberta also hired a senior program advisor to improve the training of enforcement personnel. Quebec developed an intranet to better deliver information to staff and management. This intranet offered employees ready access to up-to-date user guides, procedures manuals, forms, and other material to help them perform their duties. In 2000-2001 Ontario conducted a number of orientation sessions for new staff, and planned and prepared an upcoming "Dealing with Difficult Clients" course for all FRO staff.

RECIPROCAL ENFORCEMENT

For the most part, MEPs work best when the receiving and paying parents reside in the same province. When a parent moves away, as is happening more often, the MEP may use another program to collect support payments or to make disbursements. The provincial and territorial governments have passed legislation and developed bilateral arrangements for the reciprocal enforcement of support orders in these cases. Several jurisdictions used federal funds to do so.

> *Saskatchewan*: The Saskatchewan Maintenance Enforcement Office helped draft the *Reciprocal Enforcement of Maintenance Orders Act*.
>
> *Quebec*: The MEP reduced delays by reviewing reciprocal enforcement files and procedures to find short-term and long-term improvements in work processes and information systems support.
>
> *Prince Edward Island*: The province studied the requirements for conducting business among the MEPs in Atlantic Canada. The work focused on possible technical solutions to the problems associated with exchanging case and client information across jurisdictions. It hoped to address current regional needs in the Atlantic area and to contribute ideas to a national study.
>
> *Ontario*: The Family Responsibility Office developed a new case management system to better handle an estimated 12,500 active reciprocal enforcement cases. About 5,000 of these are requests from other jurisdictions and the rest are requests Ontario has made. A second project produced a policies and procedures manual for the Reciprocity Unit, based on current and best practices. With help from other jurisdictions, the Office also updated the database of Ontario residents paying support to people in other provinces.
>
> The Office has also studied procedures that would allow smaller jurisdictions (with fewer than 200 payments) to submit RESO payments electronically using E-CLIPS, which was introduced in 1999 to let people and companies remit support payments over a secure Internet-based program developed with the Royal Bank.
>
> *Newfoundland and Labrador*: In 1997–98, the province's MEP hired a second reciprocal enforcement officer to provide or collect up-to-date information for effective enforcement.
>
> *British Columbia*: The province has developed information systems, done studies, and changed service delivery, all to improve its services in reciprocal enforcement cases. For example, it set up query access to the Family Search Program case management system, designed new screens for reciprocal case transmittal forms, and upgraded equipment. It also developed policy and procedures, provided training, oriented lawyers, and studied using IVR systems for reciprocal jurisdiction clients.
>
> In addition to the work on its own system, British Columbia led the development of standard forms for reciprocal arrangements. In September 1999, the forms were approved by Canadian MEPs, by the Family Law Committee, and by US federal officials.

POLICY AND RESEARCH

Governments and government agencies are expected to continually monitor the programs and services they deliver to ensure that they are meeting their objectives and that they offer the best possible solutions. The Government of Canada has allocated funds to support the cycle of research, program development, and implementation, and evaluation that fosters pragmatic improvements to family law services.

EVALUATION AND RESEARCH

Many jurisdictions have invested federal funds to monitor and evaluate family justice reforms and special projects, to gather data, and to carry out similar work to improve policies and programs.

> *Nunavut*: In 1999–2001, the Nunavut Department of Justice did a survey to gather information about current and traditional responses to family breakdown, about the extent to which family law court procedures are used and the factors influencing use, and about the community's knowledge and perceptions of the existing family law system.
>
> The survey was designed to gather Nunavut-relevant data that would be comparable to statistics in other jurisdictions. To this end, the project used a survey instrument adapted from Statistics Canada's General Social Survey on Families. It collected data from more than 400 respondents in five representative communities. In addition, the project gathered information about the formal and informal services available in each community to address family breakdown.
>
> In a related effort, the Nunavut Department of Justice met with family law stakeholders to identify community concerns, to assess general knowledge about the system, and to explore opportunities for legal and program changes. Stakeholders were concerned about the parental and spousal rights and obligations of common-law couples, about the appropriateness of child support obligations, and about the role of extended families. The consultations also found that the underlying principles of the family law system are largely consistent with community norms and values. But families don't take full advantage of family justice services because the services are not widely available or because the families don't know about them.
>
> *Northwest Territories*: In 2000–01, the Northwest Territories' Court Services Division proposed amending legislation to allow for the administrative recalculation of child support orders. In addition, the Division planned to examine whether the Northwest Territories could implement an accredited mediation service.
>
> *Saskatchewan*: The province developed internal review and evaluation processes in 1997–98. It also established a five-year framework to monitor and evaluate new and enhanced activities. The planning identified two broad categories of evaluation issues: the impact of child support guidelines and of the new tax treatment, and the impact of the provincial implementation strategy. In 1998–99 and 1999–2000, the province surveyed clients to, in part, assess their awareness of and opinions about child support guidelines. It has also published a review of its mediation services.[548]
>
> *Quebec*: In 1998–99, Quebec created one committee to evaluate the family mediation program and another to look at the way the province determined child support. The committees are expected to assess whether the province's legislative objectives have been met, as well as to evaluate how the guidelines and related services have been introduced. In 1998–2000, the province used federal resources to pay research officers to provide

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[548] Elizabeth A. Wilkie, *Historical Reflections and Future Directions: Saskatchewan Justice Mediation Services: Family Programs Evaluation*, January 2000.

technical support, such as data collection tools. It also spent federal funds on an international survey of child support and support enforcement programs to get an informed portrait of recent developments and to look for new ways of improving its services.

Prince Edward Island: Prince Edward Island monitors court and alternative dispute resolution approaches. It has designed a framework to evaluate such pilot projects as the information officer project and the parent education program.

Ontario: As other jurisdictions have done, Ontario developed an evaluation framework and captured data on the impact of the Guidelines. In addition, it evaluated the "auto-order" pilot project, the focused assessment project, and other family justice initiatives, while continuing to contribute to national research planning and development. The FRO reviewed other jurisdictions' client satisfaction surveys, and completed work for a future survey of its clients.

Newfoundland and Labrador: The province has been evaluating and monitoring its parent education program and its support application social worker services.

Manitoba: Manitoba Justice has evaluated the parent education program and is evaluating the co-mediation project and other initiatives.

British Columbia: The province used federal resources to develop policy, to develop new family court rules, and to collect information to support evaluation and research. It is also planning to evaluate a series of special projects and initiatives, including the child support clerk function, the Rule 5 Pilot (Triage) Project, and the mandatory parenting education project. Finally, the province has commissioned research to assess how payor income and other factors influenced child support amounts established by orders before the guidelines were introduced.

Alberta: Alberta has evaluated the Parenting After Separation seminars through the Canadian Research Institute for Law and the Family and another set of seminars at the Child Support Centres (now called Family Law Information Centres). The province has been conducting a general review of family law. In the course of consultations on family law reform, Albertans will have an opportunity to comment on the province's proposal to formally legislate the use of the child support guidelines.

SURVEY OF CHILD SUPPORT AWARDS

Since the child support guidelines changed the way courts determine order amounts, federal and provincial officials agreed that any national research strategy would focus on finding out about support orders and variation orders made on or after May 1, 1997. Since there had been no way to generate statistics on this, the Survey of Child Support Awards collected early indications about how the Guidelines were working. This survey also started collecting data from court staff at about 16 court locations in 11 jurisdictions, which used federal funds to cover the cost of gathering and reporting this original data.

PUBLIC AWARENESS AND TRAINING

CHILD SUPPORT GUIDELINES

In implementing child support guidelines, the federal, provincial, and territorial governments worked to ensure that those affected by the changes would have every opportunity to get enough information to assess the implications of the changes in their individual cases. Federal funds were used for the following communications and public information strategies.

Brochures and printed materials: All jurisdictions distributed printed materials, such as brochures, booklets, and fact sheets, to inform separated and divorced parents, the general public, and family law professionals about the Guidelines. The materials, some published by the federal Department of Justice and some by the province or territory, were placed in court facilities, family service agencies, government offices, law offices, community agencies, and other locations. Further, notices in the print media or on the radio directed interested people to telephone numbers and other sources where they could request copies. Quebec and Saskatchewan also mailled notices and brochures directly to all MEP clients, while Ontario mailed information to those enforcement clients receiving social assistance.

Self-help variation kits: Alberta, Saskatchewan, Nova Scotia, British Columbia, and the Northwest Territories produced and distributed self-help kits that helped parents seeking a variation to an existing child support order.

Telephone inquiry lines: Many jurisdictions, including the Government of Canada, set up telephone information lines that parents could call for direct access to general information and for answers to specific questions. For example, Saskatchewan operated a toll-free line that provided general information about the Guidelines and that directed callers to the lawyer referral line, to education sessions, and to self-help kits. Many jurisdictions still have the telephone information services, but the resources devoted to them have decreased as demand has fallen. The other jurisdictions that spent federal funding on telephone information lines were Yukon, Prince Edward Island, Ontario, Nova Scotia, New Brunswick, Manitoba, British Columbia, Alberta, and the Northwest Territories.

Web sites: Some jurisdictions have Web sites where people can get general information about Guidelines, forms, reports, legislation, and other topics. British Columbia, Quebec and the Northwest Territories used federal resources to help pay for such sites.

Videos: Several jurisdictions produced videos. For example, in 1997 Ontario's Ministry of the Attorney General produced a 55-minute, broadcast-quality video on court processes and alternative dispute resolution in both child support and custody and access cases. The video, entitled *Separate Ways* is accompanied by a booklet and brochure. The package was designed as a self-study tool and an aid in public information presentations made by family law professionals. The package is now available in nine languages, as well as in sign language, and there are open-captioned French and English versions.

Information sessions: Ontario, Saskatchewan, New Brunswick, and Newfoundland and Labrador used public meetings to disseminate information to the general public or to specific groups. Saskatchewan ran eight sessions around the province for community groups and services, while Ontario and New Brunswick developed public information sessions that members of the family law bar delivered.

Partnerships with PLEI organizations: In Newfoundland and Labrador, the provincial public legal education and information (PLEI) organization worked with the provincial Department of Justice to organize a series of public presentations. Yukon, New Brunswick, Prince Edward Island, and Nova Scotia also worked with PLEI groups as part of their communications and public information strategies.

MAINTENANCE ENFORCEMENT

Several provincial and territorial MEPs used federal funds to support communications and public information activities that promote awareness of their activities and that improve client satisfaction. In addition to producing print materials and maintaining Web sites and interactive telephone services, they have used some more proactive strategies.

Alberta: The program has assigned staff to prepare individual responses to correspondence sent to the program or to members of the Legislative Assembly.

Quebec: Revenu Québec gave presentations at workshops, conferences, and similar events, which reached lawyers, judges, notaries, mediators, counsellors, community organizations, and the general public. Staff prepared inventories of concerned professional and community organizations in each judicial region of the province.

Saskatchewan: In 1997–98, the Maintenance Enforcement Office delivered two-hour information sessions in eight centres, after which clients could meet privately with a maintenance enforcement officer. The individual sessions proved very successful, and the officers dealt with specific cases as well as general issues. The group and individual sessions were advertised in newspapers and cheque mail-outs.

Ontario: In 2000–01, the Family Responsibility Office improved its outreach and client information services. Among other things, the plan called for a "plain language" review of all print and electronic materials, the provision of letters, forms, and public information materials in eight languages. The Office also planned public information sessions outreach similar to those offered by Saskatchewan.

Nova Scotia: In 1998–99, the province produced a video describing how the MEP handles enrolment, payment processing, and enforcement. The video was distributed to courts, transition houses, non-custodial parents' groups, professional associations, public legal education and information sources, and others.

Northwest Territories: In 2000–01, the territorial program planned to develop public awareness activities that would reinforce positive behaviour and serve as incentives to parents who have been "consistent payers."

British Columbia: In addition to its other activities, the province's enforcement program produced a style guide, and it developed principles and business rules for its communications staff, who were trained accordingly.

TRAINING

All jurisdictions trained those working with the new child support guidelines, namely court and departmental staff, judges, family lawyers, and others who deliver family justice services. British Columbia, Alberta, Saskatchewan, New Brunswick, Prince Edward Island, Nova Scotia, Newfoundland and Labrador, and Yukon each developed training projects or strategies supported by federal Department of Justice funds.

In British Columbia, for example, a team of trainers conducted a series of two-day workshops covering the Guidelines, their application, and the resulting operational changes.

Nova Scotia, on the other hand, combined direct and "train-the-trainer" approaches for its court, maintenance enforcement, social services, and public legal information staff. Continuing legal education groups and bar associations often trained lawyers, using substantive funding from both levels of government. In addition to general training and orientation, the province organized a variety of specialized training events. The Atlantic provinces, for example, jointly sponsored a symposium on the Guidelines for lawyers, judges, mediators, and accountants in September 1999.

The earlier training (1997–99) focused on *Divorce Act* reforms and tax changes. More recently, efforts have tended to focus on informing court and departmental staff about court rules changes, provincial legislative reforms, and information system enhancements. There are, however, ongoing efforts to support other professionals. For example, the Yukon Department of Justice issues periodic information bulletins for family law professionals and service providers about new procedures and developments. It also trains its Court Services staff.

7. PILOT ADMINISTRATIVE MECHANISMS TO RECALCULATE CHILD SUPPORT AND AN OVERVIEW OF EXPERIENCES OR MODELS IN OTHER JURISDICTIONS

Some jurisdictions have proposed setting up a section 25.1 model using funds under the Incentive for Special Projects component of the Child-Centred Family Justice Fund.

PILOT ADMINISTRATIVE MECHANISMS TO RECALCULATE CHILD SUPPORT, 2000–01

BRITISH COLUMBIA

The British Columbia Ministry of the Attorney General requested financial support from the Incentive for Special Projects component of the Child-Centred Family Justice Fund in late 2000. The province wanted to study adding a comprehensive child support service to the services available at its Family Justice Centre in Kelowna. Doing so would provide parents with faster, easier, and less expensive variations.

British Columbia serves families in transition through its Family Justice Centres. With federal funding from the Child Support Implementation and Enforcement Fund, British Columbia added child support clerks to its Family Justice Centres. These clerks handle initial intake and screening, help clients with financial disclosure, calculate child support amounts according to child support guidelines, and help clients with applications to court. An evaluation recommended expanding the clerk function and integrating it with other family justice services. However, beginning in 1999–2000, many of the clerks were let go in favour of the Rule 5 Project.

The Justice Registry Rule 5 Project, which began in December 1998 and expanded to Kelowna, requires parties to a court application to attend a "triage" session with a family justice counsellor. The triage counsellor helps parties clarify their issues and refers them to community services, including mediation when appropriate. Under the Rule 5 Project, counsellors may refer clients to *Parenting After Separation* courses, family mediation services (family case conferences and trial preparation hearings are available only on referral from a judge), judicial adjudication, and three remaining child support clerks. An evaluation of the Rule 5 Project will be completed in September 2002.

In 2000–01, British Columbia proposed a pilot to add a quicker recalculation service to the triage services offered through the Rule 5 Project in Kelowna. When the alternative dispute resolution methods offered through triage do not produce an agreement, parents are prepared to present their case in court.

An important element of this extra service will be a formal link with the Family MEP. Other services could include paralegal-style assistance with court documents and affidavits, as well as information sessions for paying and receiving parents on child support issues and processes. The service will be designed for parents trying to vary a child support order because of changing financial or other circumstances.

British Columbia plans to integrate triage, mediation, and the child support clerk service at the pilot site, as recommended in the evaluation of the child support clerks. The Kelowna Family Justice Centre has been chosen as the pilot site because it serves a mid-sized city (with a population of 150,000) that is free of the challenges of remote or multicultural populations, and that has the support of the provincial judiciary and other key agencies.

The pilot would be evaluated on its ability to deliver efficient and cost-effective variations of existing orders, to establish original child support orders, and to build links with other services, such as the Family MEP mediation, Parenting After Separation, Debtor's Assistance, legal advice lawyers and courts.

NOVA SCOTIA

The Nova Scotia Department of Justice requested financial support from the Incentive for Special Projects component of the fund in late 2000, so that it could enhance and expand the services conciliators use to determine, vary, and recalculate child maintenance in many cases. The money would also be used to expand those services to provincial family courts in anticipation of the expansion of the Supreme Court (Family Division). The province is applying for funding for fiscal years 2000–01 and 2001–02. The final report will include an evaluation, so that the province can decide whether to continue these services.

Since 1998, Nova Scotia has put in place a number of alternative dispute resolution measures with the support of the Child Support Implementation and Enforcement Fund. For example, intake assistants in the Supreme Court (Family Division) can now use various methods to achieve a consent order. In areas served by the Supreme Court (Family Division), the province also has a successful mediation program in family law matters.

Finally, Rule 70 gave court officials, particularly conciliators, new authority to more efficiently manage and settle child support orders in cases where there is consent. Conciliators assess cases to see whether alternative dispute resolution would work. They look for abuse and for amenability to conciliation and mediation. As well, they can order the respondent to file required information, ensure disclosure, or discuss issues. When they need more information, they can make an interim child support order. An unsatisfied respondent can appeal to the court.

Early results from the evaluation of the conciliation service indicate that:

1. it resolves 60 to 70 percent of cases, without mediation or court,
2. many orders are being complied with, and
3. both applicants and respondents are very satisfied with the new process

The Supreme Court (Family Division) of Nova Scotia supports a holistic approach to separation and divorce. It strongly supports options outside court for resolving family matters.

More conciliation training will encourage use of Rule 70 conciliation procedures, and in particular will introduce them to provincial family courts as unified family courts expand. Federal Department of Justice officials have recommended funds to train court administrators and justice officers based at three court sites: Halifax Regional Municipality, Cape Breton Regional Municipality, and one provincial family court. The orientation will:

- introduce provincial staff to the concept of conciliation (as enabled by Rule 70);
- describe where conciliation fits in the ADR continuum;
- discuss the way conciliation will change participants' roles; and
- identify further training needs.

Nova Scotia offered further training in conciliation to its court staff in 2001–02.

Nova Scotia intends to evaluate these services along with others offered by the Supreme Court (Family Division). The expected findings of the evaluation include:

- an increased number and proportion of cases solved out of court and through conciliation;
- a high percentage of clients satisfied with court services provided to resolve their cases;
- a high degree of client confidence in the fairness and effectiveness of the process;
- a high level of satisfaction with the process among stakeholders;
- a quicker resolution of matters using the process; and
- increased information about and awareness of child support guidelines.

NEWFOUNDLAND

Working with a community mental health organization, Newfoundland and Labrador set up a pilot project in 2001 to integrate family justice services and to resolve family law disputes more holistically. Known as Family Justice Services Western, this pilot will serve divorcing and separating parents who apply to the supreme and provincial courts in Corner Brook. The province would like to develop this pilot further in fiscal years 2001–02 and 2002–03.

Supreme Court and provincial family court judges in Corner Brook proposed to house a series of innovative family justice services with Blomidon Place. Blomidon Place "work[s] together with professional agencies, community-based groups and consumers to promote quality community mental health services through structures that address individual family and community issues." The board of Blomidon Place comprises representatives from government, community groups, and clients.

Family Justice Services Western will offer alternative dispute resolution in cases involving custody, access, and child support; legal information; multidisciplinary community services (including home assessments and supervised access); and parent education. Family and youth counselling are also available at Blomidon Place.

The project's short-term objectives are:

- to inform all users of the services of the court services and process;
- to inform parties of relevant family law, available options, and ways to access them;
- to identify clients' issues and make appropriate referrals;
- to inform parents of the impact of separation and divorce on children;
- to teach parents not to involve children in disputes;
- to negotiate agreements in child support and custody and access, even if one party lives outside the province;
- to provide supportive family justice services;
- to monitor the development and progress of this service for all users; and
- to evaluate the pilot project and identify gaps and unmet needs.

The project's long-term goals are:

- to increase use by clients of alternative dispute resolution for services related to family law;
- to reduce the number of litigated cases;
- to gather empirically based information so that federal and provincial governments can establish national policies on family justice services;
- to examine ways of identifying and addressing unmet needs for family justice services (including ways that rely on early and alternative dispute resolution), for multidisciplinary services, for information assistance, and for other "non-legal" services; and
- to explore ways to improve the quality and cost effectiveness of family justice services through traditional and alternative delivery mechanisms.

The pilot requires four staff members:

- a recalculation clerk, who assesses and triages needs, refers clients to other resources, and maintains a system to review support orders that need periodic recalculation;
- a support application social worker, who is the first point of contact for divorcing or separating parents, negotiates issues around child support, and has the authority to file consent orders;
- a mediator trained in law; and
- a counsellor or assessment worker, who assesses homes (as required by the mediator, the court, or both), counsels on access issues, arranges supervised access at Blomidon Place, and coordinates parent education programs at Blomidon Place.

Newfoundland and Labrador passed regulations in 2001 to support the *Divorce Act*, section 25.1, which allows a province to set up an administrative body to recalculate child support on the basis of updated income information.

Provincial legislation, the *Family Law Act*, has similar provisions. This pilot will help the province decide whether this authority should be invested in the SASW or in the recalculation clerk.

SASKATCHEWAN

Saskatchewan is studying an administrative mechanism for determining variations and other recalculations of child support through a dispute resolution clerk operating out of the Maintenance Enforcement Office.

Participants in the 1998 custody and access workshops repeatedly raised concerns about access to justice. Currently, parties seeking a recalculation must hire a lawyer or use a self-help kit. The legal aid caseload may delay and frustrate parties seeking variations. As well, lack of access to timely variations may increase enforcement costs, decrease support to children, and cause frustration with the justice system.

Under the proposal, the dispute resolution clerk, or conciliator, would receive referrals from the Maintenance Enforcement Office. This person would travel to each judicial centre, as access to lawyers and courts can be particularly difficult in rural areas. The conciliator would assess changes in the parties' financial circumstances or in the custody of and access to the child. He or she would also gauge the impact of these changes on existing orders or agreements.

Then, she or he would offer conciliation or mediation services to clients. Parents would make their own agreement or a consent order could be filed. (A parent who disagrees with the recalculated order may still apply to court.) In cases where custody or access are issues, the conciliator could provide mediation if possible, or refer parties to mediation. The conciliation service will be accessible by toll-free line and by mail, and will be evaluated.

OVERVIEW OF EXPERIENCES OR MODELS IN FOREIGN JURISDICTIONS

UNITED STATES

The states of Washington and Oregon have set up successful child support administrative schemes.

WASHINGTON

The Division of Child Support can order child support administratively for parents on social assistance or for parents who fill out a form to apply for the division's services.

A child support enforcement officer then prepares a notice of proposed child support and sends it to the applicant for approval. If the applicant does not agree with the proposed amount, the enforcement officer negotiates with the applicant. If he or she agrees, the other parent is served with a notice and finding of financial responsibility by certified mail.

The other parent (the "obligor") has 21 days to return an objection to the Division of Child Support. If the obligor responds with a request for a hearing, the division's personnel set a hearing date 90 days later. If an objection doesn't arrive on time, a default order is entered against the debtor.

The enforcement officer, who has had the file throughout the process, signs the default order. The order has the immediate force and effect of a court order. If one of the parties objects to the amount of child support assessed, the support officer then takes measures to bring the parties to a consent agreement on the amount of child support.

The modification process resembles the child support establishment process. The modification review takes place on the request of one of the parents. The enforcement officer responsible for enforcing the payments also manages the case. Once this person has received the application for a modification, she or he sends a notification of review the other parent, along with a child support schedule and a financial declaration, which both parties must fill out, sign, and return.

After the enforcement officer has finished the review, he or she sends a review findings notice by certified mail to both parents. If the parents disagree with the finding they can request a modification conference, which is an informal meeting between the officer and one or both of the parents. They may bring income and other information pertinent to the officer's findings to this meeting.

When a parent asks for a modification to a court order, the file is reviewed and then sent to the prosecuting attorney's office. The prosecuting attorney takes the matter to court.

OREGON

The administrative child support scheme closely resembles the Washington model. Both states' approaches typify the American administrative child support approach in various states.

First, the State of Oregon sends a request for administrative hearing to the obligor by certified mail and to the obligee by regular mail. Once the parties have received the notice, they both have the right to:

- agree with the support amount assessed;
- ignore the support amount assessed; or
- disagree with the support amount assessed.

If the parties agree with or ignore the amount assessed, the proposed order they received is filed with the court as the new support order. The court is involved at this stage in Oregon, which differs from the procedure in Washington's purely administrative model. At this stage, the county court sends a copy of the new support order to the Department of Human Resources for enforcement procedures.

If either party disagrees with the support amount assessed, he or she must return the written request for a hearing within 20 days of receiving the documents. An administrative hearing is then set to take place within 30 to 60 days, and the Department sends a notice of hearing to the other party.

The parties are asked to testify about their finances before an administrative referee of the Employment Department Hearings Unit. The parties get a copy of the referee's decision within seven to 14 days of the hearing. At this point, the parties can agree with the referee's decision or disagree with the order by appealing to the court where the referee's order was filed. If the disputing party does not attend the administrative hearing, the state attributes the party's income based on the most recent information available.

The Oregon process for modifying an existing order is quite systematic. First, the request or notice for modification is received if the obligor is on public assistance, or if the existing order is at least two years old, agency personnel then send both parties the following documents:

- an initial notice of review and adjustment (which is used to notify the parties 30 days before the review and adjustment start);
- a uniform income statement; and
- a medical insurance option

After the 30-day period has passed, the review modification process starts. If a modification is best, the state's motion for modification and proposed order is prepared and sent to both parties. A request for administrative hearing, a support computation worksheet, and the other party's uniform income statement are enclosed with this form.

The parties then have 30 days to request a hearing. Doing so triggers the same hearing process as for the establishment cases. When the order resulting from the hearing is received from the Employment Department Hearing Unit, the order is filed with the court if the original support order was administrative.

If the parent wants to modify a judicial order, the administrative order is docketed with the court and an order approving administrative order is prepared and sent to the parties, along with a notice of intent to enter order or judgment. The parties have 10 days from the date of service to object to the proposed order, in which case the matter would be set down for a court hearing.

AUSTRALIA AND NEW ZEALAND

In Australia, the Child Support Agency uses a formula to assess child support.

If a parent seeking child support does not already have a child support order, he or she can apply for the services of the Child Support Agency. The formula takes into account each parent's taxable income, the number of children, the set living expenses of the parents, and the living arrangements of the children. If circumstances change, the parents must advise the Agency and ask it to revise the assessment. If either parent is unhappy about the assessment, she or he can object in writing to the Child Support Agency. If the parents disagree with the outcome of the objection, they can apply to the Family Court.

An assessment period will last no longer than 15 months. A new assessment period starts once a current tax assessment is issued.

In New Zealand, the person with custody applies to Inland Revenue for child support. Inland Revenue, using a standard formula, calculates how much child support must be paid each year. It then divides the annual assessment into monthly amounts, and sends a letter to the paying parent telling him or her how much to pay, and a letter to the child's custodian saying how much he or she will receive. Inland Revenue Child Support collects payments from the paying parent and passes them on to the custodian, or to the government, if the custodian is receiving a benefit.

8. COMMUNICATIONS AND LAW INFORMATION ACTIVITIES

AWARENESS AND EDUCATION ACTIVITIES

With the 1997 changes to the child support laws came a vast requirement to provide timely and accurate information to custodial and non-custodial parents and their families, to members of the legal community, to the judiciary, to accountants, and to Canadians generally. The federal Department of Justice launched public information products and services to inform and educate its target audiences about the reforms and their implications. In addition, communications staff provided advice and support to the rest of the Department and to the Minister of Justice.

TOLL-FREE INFORMATION LINE

After the Child Support Initiative was announced in the March 1996 federal budget, the federal Department of Justice provided a toll-free telephone information line that Canadians could call for general information about the new child support laws. Initially, the telephone service was part of the budget line, but the Department later maintained it separately.

Trained operators answered more than 118,000 calls, sent out more than 150,000 publications, and referred callers to other sources of information or service, when needed. Most callers wanted *The Federal Child Support Guidelines: A Guide to the New Approach,* which summarizes the Guidelines. The line was open Monday to Friday from 9:00 a.m. to 5:00 p.m., Eastern Standard Time, with extended hours during advertising campaigns.

We periodically reviewed the demand for the toll-free line so we could hire and train any needed operators. Call volume fluctuated depending on the public environment. For example, during advertising campaigns or following mail-outs, calls increased substantially.

DIRECT MAIL CAMPAIGNS

On May 1st, 1997, the child support amendments were in force, but a June federal election delayed the release of some information, including the direct mail campaign with Revenue Canada (now CCRA). Revenue Canada sent information about the new tax treatment of child support to approximately 725,000 Canadians who reported paying or receiving child or spousal support. The federal Department of Justice participated in the mail-out, enclosing a pamphlet about the federal guidelines and informing people of its toll-free information line. In the two weeks immediately following the June 1997 mail-out, some 12,600 people called the federal information line for more information.

Just before the mail-out, the federal Department of Justice mailed information on the new laws to some 12,000 family law lawyers and judges involved in child support cases.

PUBLICATIONS

The federal Department of Justice produced these publications to help parents and the legal community understand the new child support system:

- fact sheets on the newest federal enforcement laws;
- a pamphlet, *Federal Child Support Guidelines (10 things you need to know)*;
- a 28-page booklet, *The Federal Child Support Guidelines: A Guide to the New Approach*, which summarizes the Guidelines;
- the Federal Child Support Tables and an instruction sheet;
- *The Federal Child Support Guidelines: The Complete Workbook* for the professional community and parents;
- *The Federal Child Support Guidelines: A Workbook for Parents* to help estimate child support amounts; and
- *The Federal Child Support Guidelines: Reference Manual* to help lawyers and judges (subscribers to the manual received updates).

In addition, posters and bookmarks were produced for use at conferences and exhibits.

By May 1, 1997, the provinces and territories had many copies of the federal publications. They distributed the federal materials with their own information on court procedures and other provincial matters, using a child support kit folder supplied by the federal Department of Justice. Since the beginning of the Child Support Initiative, the federal Department of Justice has distributed more than one million publications to the provinces and territories and to callers to the toll-free telephone line.

Two of the publications, the *Federal Child Support Guidelines* pamphlet and *Federal Child Support Guidelines: A Guide to the New Approach* were transferred to audiocassette for persons who are visually impaired.

As well, a newsletter went out four times a year to members of the legal community and to people interested in the Child Support Initiative. Each issue contained federal news about, for example, regulatory amendments, consultations, recently released research reports, and new publications. The provincial and territorial governments and public legal information organizations were invited to include information in each issue.

ADVERTISING

In fall 1997, the federal Department of Justice launched a national advertising campaign to raise public awareness of the child support guidelines. The campaign was a joint effort by the federal, provincial, and territorial governments and included their telephone numbers for further information. Ads appeared twice in some 160 daily, weekly, and community newspapers across the country. The ads also appeared in magazines, including *Maclean's, L'Actualité, Chatelaine, TV Guide, TV Hebdo, Today's Parent, Reader's Digest*, and *Enfants Québec*.

In winter 1998, ads appeared in selected legal and accounting publications to inform readers about publications that could help assist them, including *The Federal Child Support Guidelines: The Complete Workbook and The Federal Child Support Guidelines: Reference Manual*. As well, the Department advertised in selected family magazines to raise awareness about the child support guidelines and to further promote the federal, provincial, and territorial information lines.

In April 1998, the federal Department of Justice launched a national campaign to inform more than 750,000 Aboriginal people about the child support guidelines, the department's toll-free telephone line, and the Department's Internet site. The campaign ran for two months and included radio announcements and newspaper advertisements in English, French, and Inuktituk. Participating broadcasters were encouraged to translate the material into the Aboriginal languages of the communities they served.

As part of the campaign, the Department produced a poster and a special version of the pamphlet, *Federal Child Support Guidelines (10 things you should know)*, which it distributed to band offices, hamlets, co-ops, friendship centres, and Aboriginal child and family support services. As a result of the Aboriginal campaign, the CBC's Northern Service asked the Department to develop a public service announcement for television.

Between January and March 1999, the Department published a notice in selected transportation magazines explaining how changes to the *Family Orders and Agreements Enforcement Assistance Act* could affect holders of certain transportation licences.

In March 1999, a slightly revised version of the fall 1997 print ad appeared in daily and community newspapers across the country. The ad appeared in daily newspapers three times and in community newspapers twice.

Finally, in October 2000, with the support of various government stakeholders, the Department launched a television campaign to encourage the payment of child support and to promote positive parenting. The ad focused on the message that children need love, attention, and financial support from both their parents. Again, it provided a toll-free number for viewers to call for further information.

INTERNET

In 1998, the Department developed and launched a child support Web page on its site to provide divorcing and divorced parents with information on the Child Support Initiative. It also provided a source of legal and research information for family law professionals and others concerned with the technical aspects of the reforms. In 1999, the Department added a list of selected case law and summaries to the site. In the summer of 2000, following focus testing with potential users, the Department revamped the child support site to make it easier to use.

PROVINCIAL AND TERRITORIAL ACTIVITIES

The federal Department of Justice worked with the provinces and territories to maximize the impact of communications across the country. Each province and territory developed its own complementary communications tools, including:

- self-help kits for variation of orders and for the divorce process;
- booklets, pamphlets, and fact sheets covering divorce and separation, family law, child support, child support enforcement, spousal support, parenting after separation, custody and access assessments, supervised access services, court services, mediation conciliation, children's rights, and family court rules;
- videos on divorce and separation, court process, mediation, and parenting after separation;
- education curricula for children experiencing separation and divorce; and
- a child support resource binder for service providers.

TRAINING OF LEGAL PROFESSIONALS

Both before and after the *Federal Child Support Guidelines* came into force, the federal Department of Justice offered training to lawyers, judges, mediators, and other legal professionals to help them implement the Guidelines. At the request of all provinces and territories, Department officials attended countless provincial or territorial seminars, conferences, and training sessions to educate legal professionals about the new child support laws.

NEEDS ASSESSMENTS

The federal Department of Justice focused on reaching people who have a hard time getting information about the Canadian legal system and the Guidelines. The Department assessed these people's needs to find out how best to reach them. First, 12 organizations across the country identified three to five groups within their province or territory and some of the barriers these groups faced. Then, 11 contractors studied how best to provide information to a specific group, with a view to developing communications tools and activities for that group.

Research by:	Groups studied:
Barreau du Québec	• low- and middle-income payers of child support (Quebec)
Community Legal Education Association (Manitoba)	• low-literacy and low-income people (Manitoba)
Community Legal Education Ontario	• low-income women (Ontario)
Law Courts Education Society	• northern First Nations communities (British Columbia)
Legal Studies Program, Faculty of Extension, University of Alberta	• intermediaries (Alberta)
Public Legal Education and Information Service of New Brunswick	• rural parents, including women leaving violent relationships (New Brunswick)
Public Legal Information Association of Newfoundland	• low-literacy and low-income people (Newfoundland and Labrador)
Public Legal Education Association of Saskatchewan	• rural parents, including rural women in abusive relationships (Saskatchewan)
Shannon Gullberg	• Aboriginal people (Northwest Territories)
The People's Law School	• recent immigrants (British Columbia)
The Public Legal Education Society of Nova Scotia	• the Canadian military

These reports were summarized in *How to Provide Hard-to-Reach Audiences with Information about the Child Support Guidelines: A Summary of Findings From the Needs Assessment Research, Phase 2.*[549] These studies helped the federal Department of Justice, as well as public legal education and information organizations, provide law information to groups affected by various economic, linguistic, geographic, or other circumstances.

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[549] See Vicki Schmolka, *How to Provide Hard-to-Reach Audiences with Information About the Child Support Guidelines: A Summary of Findings from the Needs Assessment Research, Phase II* (Ottawa: Department of Justice, BP 27E, 2000).

FOLLOW-UP TO THE NEEDS ASSESSMENTS

Although no one method surfaced as the "best" way to provide information in all circumstances, the needs assessment reports suggested three methods were most likely to reach the identified groups: information for service providers, print materials, and a national media campaign.

INFORMATION FOR SERVICE PROVIDERS: FAMILY LAW INFORMATION KIT

Service providers—such as staff at a community information service, a cultural community centre, a religious organization, or a women's shelter—regularly come into contact with members of the public. People turn to service providers for help in times of need and rely on them for support and answers to questions. The researchers found that many non-legal service providers did not have basic information about the Guidelines. Many service providers said they would be interested in learning more so that they could serve their clients more effectively. As a result, a law information kit was developed for service providers. It brought together a range of information about family law, including child support issues.

PRINT MATERIALS: DIVORCE BOOKLET

Many participants in the studies were interested in short, clearly written print materials. So the Department updated the divorce booklet, which includes information on custody, access, child support, spousal support, property division, and ways to get a divorce. The booklet had gone out of date since it was written in 1986. The new text was presented in a simple format and was written to a Grade 8 reading level.

NATIONAL TELEVISION CAMPAIGN

The national television campaign, described above, was an important way to communicate with hard-to-reach Canadians.

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